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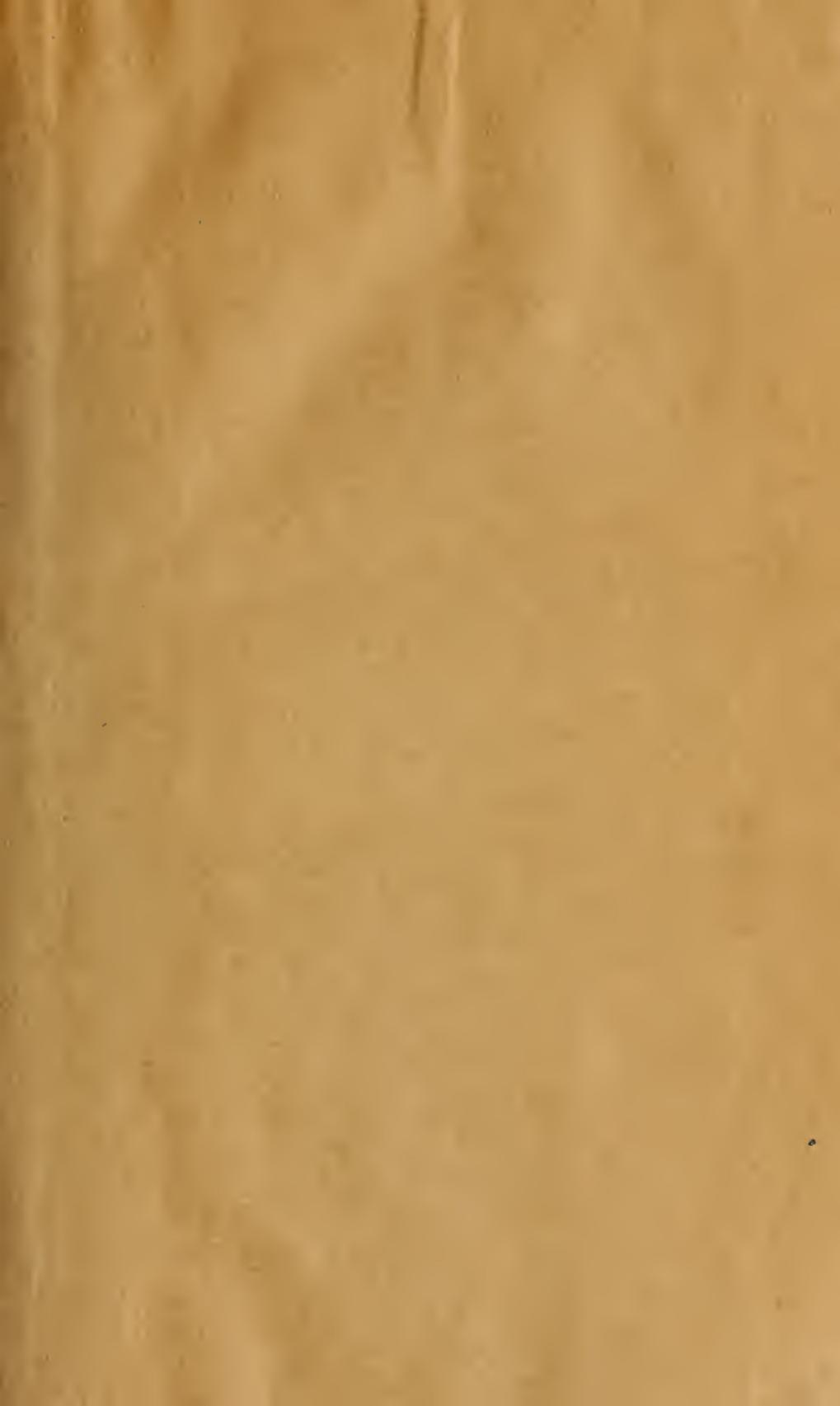
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A TREATISE
ON THE
SPECIFIC PERFORMANCE
OF
CONTRACTS,
INCLUDING
THOSE OF PUBLIC COMPANIES.

BY

EDWARD FRY,

OF LINCOLN'S INN, ESQ., B. A., BARRISTER-AT-LAW.

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P R E F A C E.

THE following pages contain an attempt to inquire into the principles which govern Courts of Equity in the Specific Performance of Contracts. I offer this little book to the members of my profession, with somewhat of hope, because I know the indulgence with which they are wont to accept the results of honest labour spent on professional subjects; but with much more of diffidence, because I am not ignorant of the difficulties of the subject on which I have written, or the shortcomings of my own performance.

The scope and object of my essay will be sufficiently learned from the Table of Contents. It will at once be seen that they are essentially different from those of the admirable works of Lord St. Leonards and Mr. Dart on the Law of Vendors and Purchasers. Those treatises discuss the contract of sale of real estate and all the relations thence arising, so that the doctrine of specific performance is treated of only as one mode in which that contract is enforced: whilst the present work is designed to elucidate the principles of specific performance in general, and the contract of sale only so far as it requires attention as one of the contracts which the court enforces. If the object of those learned treatises had not been thus distinct from that of the following pages, I should never have thought of committing them to the press.

The connection of the different branches of law is, like the connection of the sciences, so close as often to embarrass the writer who attempts to treat of one subject by itself. I have found this difficulty continually recurring, as I have been engaged in composing this book, because it is by no means easy to decide how much of the law on many questions ought to find place in a treatise on the principles and practice of the

courts in specific performance, and how much ought to be referred to a discussion of the particular species of contract to which the point may relate. I have endeavoured on each occasion to solve this question with a view to the practical utility of the following pages, and to what I suppose a lawyer would reasonably expect to find in a treatise bearing the title of this volume.

There is now pending in Parliament a bill which has been introduced by the solicitor-general, Sir Hugh M. Cairns, intituled “A bill to amend the course of procedure in the High Court of Chancery, the Court of Chancery in Ireland, and the Court of Chancery of the county palatine of Lancaster,” by which it is proposed to be enacted, that “in all cases in which the Court of Chancery has jurisdiction to entertain an application for an injunction against a breach of any covenant, contract, or agreement, or against the commission or continuance of any wrongful act, or for the specific performance of any covenant, contract, or agreement, it shall be lawful for the same court to award damages to the party injured, either in addition to, or in substitution for, such injunction or specific performance, and such damages may be assessed in such manner as the court shall direct.” The desirableness of clothing courts of equity with a jurisdiction in damages in the cases referred to in this clause of the bill appears to be beyond question—as I have already remarked in the chapter on Compensation in the present work (see § 795,)—and the passing of the solicitor-general’s bill will be a most material improvement to the jurisprudence of the country.

Several important decisions on the subject of specific performance have appeared during the progress of these pages through the press, references to which have been inserted in the notes.

My friend Mr. J. P. Green, of the Middle Temple, has obligingly read the proof-sheets of this book: I gratefully acknowledge his kindness in so doing.

E. F.

5, NEW SQUARE, LINCOLN'S INN,
24th May, 1858.

CONTENTS.

The pages referred to are those between brackets [].

TABLE OF CASES,	xvii
---------------------------	------

PART I. OF THE JURISDICTION.

CHAPTER I.

OF THE CONTRACTS IN GENERAL WHICH ARE SUBJECTS OF THE JURISDICTION.

Principle of the Jurisdiction.—Legal Remedy deficient.—By Default of the Plaintiff.—From something in the Contract.—From the Nature of the Subject-matter.—From the Parties.—From the Form of the Contract.—Former Practice of the Court.—Legal Remedy inadequate.—Cases where Legal Remedy is adequate.—Contract for Yearly Tenancy.—Contract to make Railway.—Agreement to pay Money.—Alternative Remedy.—Cases where Legal Remedy not so beneficial.—Sir John Leach's Doctrine.—Contracts under Compulsory Powers.—Contract enforced by Vendor.—Stock.—Railway Shares.—Chattels.—Unique articles.—Defendant alone can supply the Plaintiff's Requirements.—Savouring of the Realty.—Trust constituted.—Damages not an accurate Satisfaction.—Incapacity of the Court to execute the Contract.—Goodwill of a Business.—Where the Interference of the Court would be useless.—Agreements to enter into Partnership.—Agreement for lease, where Covenant has been broken.—Contracts to build and execute Works.—Exceptions: 1. Where the Work is defined and essential to the Plaintiff; 2. Where Part performance.—Hiring and Service.—Where Court had no original Jurisdiction.—Foreign Contracts.—Contracts as to Land abroad.—Voluntary Contract.—Where Plaintiff has proceeded at Law,

1

CHAPTER II.

OF CONTRACTS WITH A PENALTY.

Effect of a Penal Sum on the Jurisdiction.—The Question stated.—The whole Scope of the Contract regarded.—As to the Amount of the Pe-

nalty.—The Benefit of the Penalty and of the Agreement result to different Persons.—Single Sum and continuing Act.—Increased Rent.—Where a Forfeiture in addition.—Where the Agreement reasonable only as an alternative one.—Two Penal Sums.—Procedure,	26
--	----

PART II.

OF PARTIES TO THE SUIT.

CHAPTER I.

OF THE GENERAL RULE.

The Parties to the Contract to be Parties to the Suit.—Adverse Rights.—Sub-purchaser.—Alienee of Vendor.—Exceptions to General Rule.—Novation.—Reversioner.—Remainderman.—Assignees in Bankruptcy.—Some suing or sued on behalf of all.—Avoiding Multiplicity of Suits.—Where one Lot sold is involved with adjoining Lot.—Adverse claimants.—Voluntary Settlement.—Trustee and Cestui que trust.—Multifariousness,	32
---	----

CHAPTER II.

OF A STRANGER TO THE CONTRACT.

A Stranger cannot sue.—Hook v. Kinnear and Philips.—Exceptions.—1. Exception as to Marriage-contracts.—As to Issue.—As to Collaterals.—Goring v. Nash.—As to Appointees.—Sutton v. Chetwynd.—As between Collaterals and Original Parties.—2. Exception from Relationship of Parties.—3. Exception where third Party's Status changed,	41
---	----

CHAPTER III.

OF THE DEATH OF A PARTY TO THE CONTRACT.

Death of a Party.—Death of Vendor.—Widow.—Contract enforced by Creditors.—Death of Purchaser.—Death of proposed Lessee.—Discharge of the contract by Death, where personal Qualities are required,	47
--	----

CHAPTER IV.

OF AN ASSIGNMENT OF THE AGREEMENT OR OF THE PROPERTY.

Assignment of the Agreement.—Assignment by way of Mortgagee.—Exceptions.—1. Where the Contract is Personal.—2. Where there is a Proviso against Assignment.—3. Illegality of Assignment.—Maintenance.—Public Trust.—Offer not assignable.—Assignment of the Property.—Assignee a Defendant.—In case of Covenants.—Covenants for further Assurance.—Contracts to devise Lands.—By Amalgamation of Companies,	51
---	----

CHAPTER V.

OF THE LIABILITY OF COMPANIES FOR THE CONTRACTS OF THEIR PROMOTERS.

- Edwards v. Grand Junction Railway Company.—Conditions under which the Doctrine is applicable.—The Company must have taken the Benefit of the Agreement.—The Agreement must have been warranted by the Terms of Incorporation.—Doubts on the General Principle, 61

CHAPTER VI.

OF AGENCY.

- Contracts by Agents.—Agents appear on Contract as such.—Agents appear on Contract as Principals.—Principals suing and being sued.—Agents not generally to be Parties.—Question whether Party is Principal or Agent.—Agent suing.—Agent being sued, 67

PART III.

OF THE DEFENCES TO THE SUIT.

CHAPTER I.

OF THE INCAPACITY TO CONTRACT.

- Nature of the Defence.—When Incapacity to be judged of.—Married Women.—Under Power informally exercised.—Parties to suit in respect of separate Estate.—As to real Estate.—Lunatics.—Persons standing in confidential Relations, 71

CHAPTER II.

OF THE NON-CONCLUSION OF THE CONTRACT.

- No Specific Performance except of a concluded Contract.—Proposal and Acceptance.—Essentials of the Acceptance.—The Acceptance must be unequivocal.—And without Variance from the Offer.—And not introduce any new Term.—What is not a new Term.—The Acceptance must be without unreasonable Delay.—What determines the Proposal.—1. Withdrawal.—2. Refusal.—Variations of the Proposal.—How the Acceptance may be made.—By Parol.—By the Bill.—By Acts.—Time at which the contract is constituted.—An Agreement to do an Act on Demand and a Demand constitute a Contract.—Representation and Conduct.—Representation of Things past.—Representation of Things future.—Representation must be clear and absolute.—Where the Engagement is merely honorary.—Maunsell v. White.—Money v. Jorden.—Morehouse v. Colvin.—Cases where Representation binding.—In cases of Marriage-contracts.—Luders v. Anstey.—Saunders v. Cramer.—Montgomery v. Reilly.—Du Biel v. Thompson, 75

CHAPTER III.

OF THE INCOMPLETENESS OF THE CONTRACT.

Contract must be certain, fair, and just.—Where Part-performance.—Completeness to be ascertained at the filing of Bill.—Exceptions.—When Incompleteness arises from Default of Defendant.—Or may be made good from the Contract itself.—Completeness to be considered.—1. As to Subject-matter.—Where ascertainable though not ascertained.—2. As to Parties.—3. As to Price.—Cases where not ascertained.—Mode of Ascertainment indicated by the Contract.—First class of Cases.—Second Class of Cases.—4. As to Terms of the Contract.—Instances of Contracts held incomplete.—Implied Terms.—Condition for good Title implied.—In Agreements for Under-leases.—Implication as to usual Stipulations.—Implied Terms rebutted by a Condition or by Notice, 90

CHAPTER IV.

OF THE UNCERTAINTY OF THE CONTRACT.

What Amount of Certainty required.—Instances, 102

CHAPTER V.

OF THE WANT OF FAIRNESS IN THE CONTRACT.

Nature of the Fairness required.—When ascertained.—Contracts involving Contingencies.—The Contingency must be really such to both Parties.—The Contingency must have been understood as within the Contract.—Fairness of surrounding Circumstances.—Intentional Unfairness not necessary to be proved.—Suppression of a Fact.—Intoxication.—Contract injurious to Third Persons.—Contracts necessitating a Breach of Trust.—Cases of Quasi Trustees.—Rescinding Contract on this ground, 106

CHAPTER VI.

OF THE HARDSHIP OF THE CONTRACT.

Hardship a Bar to the Court's Interference.—When ascertained.—Instances of subsequent Circumstances disregarded.—Instances of subsequent Events regarded.—Subsequent Events dependent on Plaintiff.—Distinction between patent and latent Hardship.—Hardship induced by the Party himself.—Failure of Party's Scheme.—Hardship on Members of a Corporation.—Forfeiture.—Where Vendor would be left subject to a Liability.—Liability disregarded.—Miscellaneous instances of Hardship.—In contracts by Companies.—Sales of Reversionary Interests.—Where Principle does not apply, 116

CHAPTER VII.

OF INADEQUACY OF THE CONSIDERATION.

How it may appear in the Contract.—Difference between Cases of Vendor and Purchaser.—Inadequacy with other Circumstances.—Inadequacy by itself.—As a Ground for setting aside Contracts.—As a Defence to specific Performance.—Mere Inadequacy not a Defence.—Reason of the Rule.—Rule of the Civil Law.—When Inadequacy is to be ascertained.—In Sales of Reversionary Interests, 127

CHAPTER VIII.

OF WANT OF MUTUALITY IN THE CONTRACT.

Mutuality required.—Instances.—In Contracts under Powers.—Time at which Mutuality is to be judged of.—Exceptions.—1. Unilateral Contracts.—2. Waiver.—3. Agreement signed by one Party only.—Alleged Reasons.—Agreement in Deed-poll.—4. Vendor has only partial Interest.—Doubts of Lord Redesdale.—Restrictions on the Right of the Purchaser to take the Vendor's Interest.—1. Compensation not ascertainable.—2. Prejudice to Third Parties.—3. Large Part not Vendor's.—4. Purchaser aware of Vendor's Title.—Purchaser privy to intended Fraud, . 133

CHAPTER IX.

OF THE ILLEGALITY OF THE CONTRACT.

Illegality a Bar to Performance of a Contract.—Peculiar nature of the Defence.—How far the Illegality must be made out.—Where a Trust is constituted, 143

CHAPTER X.

OF THE CONTRACT BEING ULTRA VIRES.

Contracts by Corporations must be within their Powers.—But are presumed to be Good.—Where the Presumption is rebutted.—What Contracts are prohibited.—Contracts defeating Object of Incorporation.—For Objects foreign to Incorporation.—Contract valid, when for something involved in the Object of Incorporation.—Where a Variation of Means only, not of Ends.—Where one Party has not Notice of its being *ultra vires*.—Cases between Shareholders and Directors, 147

CHAPTER XI.

ON THE STATUTE OF FRAUDS AND THEREIN OF PART PERFORMANCE.

Fourth Section of the Statute.—I. How taken Advantage of.—By Demurrer.—By Plea.—By Plea and Answer.—By Answer denying the Agreement.—Or admitting a parol Agreement and pleading the Statute.—II. What satisfies the Statute.—The Writing must express a concluded Agreement.—A formal Agreement intended.—Signed by one Party.—Signature.—How far Intent to sign necessary.—Must be a Writing of the Name.—In Pencil.—In Print.—Initials.—Agency.—Ratification.—Revocation.—Auctioneer.—Clerk of Agent.—Solicitor.—Letters.—Letters referred to for Signature.—Letters to supply a Term.—Letters as constituting the Contract.—Letters repudiating.—Parol Agreement before Marriage, written after.—Pleading.—III. What takes an Agreement out of the Statute.—1. Sale by the Court.—2. Admission.—As against Representatives.—3. Fraud.—In Marriage Contracts.—In Wills.—4. Of part Performance.—Essentials.—The Acts must refer to an Agreement.—And not to any other Title.—The Acts must render Non-performance a fraud.—Where not fraudulent from Character of the Person.—From Nature of the Act.—From there being alternative Remedies.—The Agreement must be such as can be enforced.—And not of an honorary Character.—Or incomplete.—Of particular Acts.—Possession.—Laying out of Money.—Payment of Purchase-Money.—Of other Money that may be repaid.—

Payment of Auction duty.—Payment of additional Rent.—Marriage.—Cohabitation.—Previous Acts.—Preparatory Acts.—Performance by another party to the Agreement.—Of the Evidence of the Contract.—It must be clear.—What Variations are immaterial.—Part reduced to Writing.—Agreement admitted in Answer.—Denied by Answer.—A different Agreement set up by Answer.—Inquiry, 155

CHAPTER XII.

OF MISREPRESENTATION.

Effect of a Misrepresentation.—Elements.—1. Statement actually untrue.—2. The not knowing it to be true.—3. The Intent of the Misrepresentation.—Corrupt Motive not necessary.—4. The Reliance on the Statement.—Vagueness of the Representations.—Other Grounds for considering that there was not Reliance.—Resort to other Means of Knowledge.—Other Knowledge itself.—Where Defect is patent.—Analogy with Warranties.—The Evidence of Knowledge must be clear.—Other Means of Knowledge open to the Purchaser not enough.—Doctrine of Notice does not apply.—General Statement inconsistent with the Misrepresentation is not enough.—Nor recommending other Party to consult his Adviser.—Instances.—Sale with all Faults.—Assignment of a Contract affected by Misrepresentation.—5. The Misrepresentation must be essential.—Effect of Misrepresentation, 191

CHAPTER XIII.

OF FRAUD.

Fraud.—Suppression of a Fact.—Suppression by Purchaser.—Puffing at Auctions.—Fraud by Corporations.—Fraud by Agents.—Waiver, 206

CHAPTER XIV.

OF MISTAKE.

Kinds of Mistake that occur in Contracts.—Principle of the Defence.—Parol Evidence admitted for Defence.—Mistake of the Defendant.—Mistake purely of Defendant.—Parol Variation set up by Defendant.—Where enforced.—Where Bill dismissed.—Plaintiff put to his Election.—Variation, how set up.—Evidence.—Mistake, a Ground for Rescission.—And for Rectification.—Parol Evidence admitted for Rectification.—But must be clear.—What Kinds of Mistake.—Mistake of Law.—Speculation as to Facts.—Mistake not about the Essence of the Agreement.—Where the Writing purposely differs from the Agreement.—Subsequent Parol Agreement.—Specific Performance, with Rectification of Mistake.—Cases of entire Exclusion of Parol Evidence for Plaintiff.—Previous Cases observed on.—Cases for Admission of Parol Evidence for the Plaintiff.—Opinions of American Jurists.—Of Mr. J. Story.—Of Mr. C. Kent.—Cases of Rectification and Relief in same Suit, 212

CHAPTER XV.

OF THE INCAPACITY OF THE COURT TO PERFORM PART OF THE CONTRACT.

Subjects of the Chapter.—Contract divisible or not.—Property in one Lot.—Distinct Lots.—Different Prices.—Cross-contracts of sale.—Court will

not perform Part.—Where a Deed to be executed.—In Marriage Contracts.—Exceptions.—1. When Right of Suit is in itself perfect.—2. Contract may be completely performed, though there are future Acts.—3. Where Part cannot be performed through Defendant's Default.—4. Where the Contract has negative and positive Stipulations.—5. Where the Arrangement is partly honorary.—6. Where the Agreement is alternative.—7. Where the Part which the Court could not enforce is performed,	237
---	-----

CHAPTER XVI.

OF DEFECT IN THE SUBJECT-MATTER OF THE CONTRACT.

Nature of the Defence.—Defects patent or latent.—Patent Defects.—Latent Defects.—Defect unknown to both Parties.—Variation which is not a Defect.—Uncertainty in Subject-matter and Description of it.—Sale with all Faults.—Effect on the Contract of a Defect,	248
--	-----

CHAPTER XVII.

OF THE WANT OF A GOOD TITLE.

Title must be free from Doubt.—Former Practice.—Present Rule.—Observations on the Rule.—Amount of Doubt.—Moral Certainty only required.—Titles depending on Presumption.—Cases where the Presumption not sufficient.—Of the Presumption <i>Omnia rite esse acta</i> .—Nature of the Doubt,	253
--	-----

CHAPTER XVIII.

OF FAILURE OF THE CONSIDERATION.

Events affecting the Subject-matter.—Events happening before the Conclusion of a Contract.—When is the contract complete.—A Condition not performed.—Events subsequent to the Contract being entered into and become absolute.—Instances.—Extinction of Subject-matter by Lapse of Time after filing of Bill and before hearing.—Suggested Result of the Cases.—Subsequent Illegality,	262
--	-----

CHAPTER XIX.

OF DEFAULT ON THE PART OF THE PLAINTIFF.

Plaintiff must show Performance and Willingness to perform.—Representations.—Plans.—Default must be of an important Term.—Default in respect of collateral Contract.—What excuses Performance.—Infancy.—Impossibility of Performance.—Exception as to Marriage Contracts.—Limitations of the Exception.—Default in respect of Acts to be done.—Assignees in Bankruptcy.—Bankruptcy of Plaintiff.—Insolvency.—Félonies.—Loss of Deeds,	270
---	-----

CHAPTER XX.

OF ACTS IN CONTRAVIENIENCE OF THE CONTRACT.

Nature of the Defence.—In Cases of Leases.—In Cases of Purchases.—As to Covenants to renew.—Limitations of the Principle.—Breach not wilful.—Nominal Breaches.—Waiver of Breach.—Acts rendering Performance inequitable,	282
--	-----

CHAPTER XXI.

OF THE NON-PERFORMANCE OF CONDITIONS.

Contracts not to be performed until absolute.—Condition express or implied.

—Railway Contracts.—Waiver, 287

CHAPTER XXII.

OF THE INCAPACITY OF THE DEFENDANT TO PERFORM HIS PART OF THE CONTRACT.

Principle of this Defence.—Instances.—When to be judged of.—Application to Parliament required.—Subject-matter not the Vendor's.—Consent of Third Parties.—Of Execution *cy pres.*—Contract modelled so as to be legal.—Contract modelled so as to be possible.—In Railway Cases.—Impossibility of one Alternative.—One Alternative originally impossible.—One Alternative rendered impossible by the act of God.—One Alternative prevented by the other party.—One Alternative prevented by a Stranger, 290

CHAPTER XXIII.

OF THE RESCISSION OF THE CONTRACT.

Modes of Rescission.—Right to rescind.—Novation by Intervention of a new Person.—Novation by Introduction of a new Term.—Novation must be a valid Contract.—Evidence.—Rescission simply.—Evidence irrespective of Statute of Frauds.—Evidence under Statute of Frauds.—Evidenced by Conduct.—Evidence must be clear.—Conduct may prevent Party's Rights, yet not be a Rescission.—Conditions for Avoidance of Contract; how to be exercised; when it revives.—Conditions for Rescission limited by another for Compensation.—Bill praying a Rescission, . . 301

CHAPTER XXIV.

OF THE LAPSE OF TIME.

Nature of Defence.—Time different at Law and in Equity.—1. Originally of the Essence.—By express Condition.—Condition must be clear.—Implied from Nature of Subject-matter or Purpose of the Contract.—From Hardship of Delay.—From other Parts of the Contract.—Where the Contract is unilateral.—2. Engrafted by Notice.—The Time limited by Notice must be reasonable.—What Notice requisite.—3. Time as Laches.—Contract not mutual.—What Delay sufficient.—After Notice by the other Party.—Where Time will not run.—Contract substantially executed.—Pending Negotiation.—Delay arising from Party objecting to it.—Leaving Deposit.—Continuing in Possession.—Under Railway Acts.—Mere Claim.—Waiver of Objections as to Time.—Waiver of Time of an Act no Waiver of the Act.—Waiver decided at the Hearing, 312

PART IV.

OF THE MODE OF EXERCISING THE JURISDICTION.

CHAPTER I.

OF THE INSTITUTION OF THE SUIT.

By Bill.—By Claim,	327
--------------------	-----

CHAPTER II.

OF INJUNCTIONS.

How connected with Specific Performance.—1. Injunction a Mode of Specific Performance of negative Agreements.—Where the Court will not interfere.—To restrain Applications to Parliament.—Mandatory Injunctions.—Limits of the Doctrine.—2. Injunction as ancillary to Specific Performance.—Against Actions for Deposit or Damages for Delay.—Against Suits in Matrimonial Matters.—Against Third Parties.—Cautio-	329
---	-----

CHAPTER III.

OF THE WRIT OF NE EXEAT.

As ancillary to Specific Performance,	337
---------------------------------------	-----

CHAPTER IV.

OF RELIEF SUBSEQUENT TO THE DECREE.

No resort to any other Forum allowed.—Rescission of Contract after Decree for Performance,	338
--	-----

PART V.

OF INCIDENTAL MATTERS.

CHAPTER I.

OF CONDITIONS OF SALE AND PARTICULARS.

Conditions Part of Contract.—How regarded.—Where ambiguous.—Sense not extended by Implication.—Fraud.—Facts stated in Conditions,	340
---	-----

CHAPTER II.

OF COMPENSATION.

Origin of Doctrine.—Bill by Vendor.—Bill by Purchaser.—Compensation different from Damages.—Material Part wanting.—Where Defect not
OCTOBER, 1858.—2

material.—Principle of Calculation.—Material Difference in the Subject-matter.—For incumbrances.—Tithes.—Indemnity.—Where no Compensation.—Misrepresentation.—Where no Data for ascertaining the Amount.—Where the Defect is patent.—Where excluded by Contract.—For matters subsequent to the Contract.—Deterioration.—Construction of Conditions for Compensation, 344

CHAPTER III.

OF REFERENCE OF TITLE.

Where Purchaser is Defendant.—Where Purchaser is Plaintiff.—In respect of what Contracts.—Where not required.—Where the Vendor sells such interest as he has.—Limited Inquiry.—Lessor's Title.—Waiver of Right.—By Vendor.—By Purchaser.—Express, by Admission.—Implied.—To particular Objections.—1. Where the Objection is known and curable.—2. Where known and incurable.—Where an Agreement for Possession.—3. Where the Objection is not known.—By Silence of subsequent Agreement.—Acts not a Waiver.—Waiver as to Lessor's Title.—Effect of Waiver.—Pleading Waiver.—Reference when made.—At the Hearing.—Before Hearing, but after Answer.—What are Questions of Title.—Question suitable for the Hearing.—Reference before Answer.—Fifth Order of 9th May, 1839.—Inquiries as to all Matters connected with Title.—When the Title may be made out.—Time not granted.—Old Title cured, or new Title.—Form of the Certificate.—Exceptions.—Reference back.—Title at Hearing on further Directions.—What is a good Title.—Distinctions between Questions of Title and of Conveyance.—Distinction between Evidence and Title, 357

CHAPTER IV.

OF INTEREST, RENTS, DETERIORATION, AND PAYMENT INTO COURT.

Effect of a Contract in changing the Property.—1. Vendor in Receipt of the Rents, the Purchase-money being unpaid.—Interest runs from Time for Completion.—Exceptions.—What will discharge the Purchaser from Interest.—Delay from any Cause whatever.—Conditions as to Interest dependent on Conditions as to Abstract.—Interest, Amount on which.—Rate.—What Rents the Vendor is charged with.—Deterioration.—Borne by Vendor.—By Purchaser.—2. Vendor in actual Possession.—3. Purchaser in Possession.—In Sales of Reversionary Estates.—Payment of Purchase-money into Court.—Title made out.—Title not made out.—Possession according to Agreement.—Possession under other Title.—Acts of Ownership.—Occupation Rent.—Procedure, 377

CHAPTER V.

OF THE DEPOSIT.

Power of the Court over the Deposit.—1. Where Vendor is Plaintiff.—2. Where the Purchaser is Plaintiff, 394

PART VI.

OF SOME CONTRACTS IN PARTICULAR.

CHAPTER I.

OF CONTRACTS RELATING TO CONTINGENT INTERESTS AND EXPECTANCIES.

Such Contracts void at Law.— <i>Secus</i> in Equity.—Instances.—Circumstances under which not enforceable.—Such Contracts only personal,	397
--	-----

CHAPTER II.

OF COVENANTS TO RENEW.

Such Covenants are now performed by the Court.—Requirements.—What amounts to such a Covenant.—Usage to renew not enough.—Renewals by Trustees.—Diligence of Lessee.—In Ireland,	402
---	-----

CHAPTER III.

OF CONTRACTS OF PARTNERSHIP.

When enforced.—Illegal.—Impossible,	407
---	-----

CHAPTER IV.

OF CONTRACTS FOR THE SALE OF SHIPS.

The Contract must recite the Certificate of Registry.—Fraud,	408
--	-----

CHAPTER V.

OF AGREEMENTS FOR SEPARATION DEEDS.

Extent of Jurisdiction.—There must be a binding Agreement.—And of good Consideration,	410
---	-----

CHAPTER VI.

OF AGREEMENTS TO COMPROMISE.

Private.—Of Suits,	412
------------------------------	-----

CHAPTER VII.

OF AWARDS.

Extent of the Jurisdiction.—Where not binding at Law.—Grounds of Defence.—Agreement unreasonable.—Award excessive or defective.—Award unreasonable,	414
---	-----

CHAPTER VIII.

OF AGREEMENTS TO REFER TO ARBITRATION.

Court will not enforce them affirmatively.—But may refuse other Relief unless they be substantially performed,	417
--	-----

EDITIONS OF WORKS REFERRED TO.

Except where otherwise stated, the following are the Editions of Works referred to :—

- Dart's *Vendors*, 2nd edition.
- Fonblanque's *Equity*, 5th edition.
- Maddock's *Chancery Practice*, 2nd edition.
- Story's *Equity Jurisprudence*, 4th edition.
- Sugden's *Vendors*, 13th edition.

TABLE OF CASES.

The pages referred to are those between brackets, [].

Abbott v. Sworder,	130	Att.-Gen. v. Christchurch,	388
Acland v. Gaisford,	385	——— v. Day,	138, 170, 171
Acton v. Acton,	3	——— v. Manchester and Leeds	
Adams v. Blackwall Railway Com-		Railway Company,	331
pany,	9	——— v. Norwich (Corporation	
——— v. Brooke,	91	of),	154
——— v. Lambert,	342	——— v. Parther,	73
——— v. Lindsell,	82	——— v. Sitwell,	229
——— v. Weare,	120	Attwood v. ——,	412
Adderley v. Dixon,	16	——— v. Barham,	334
Agar v. Macklewey,	96, 417	——— v. Small,	192, 196, 210
Ainslie v. Medlycott,	83, 193	Aubin v. Holt,	18, 145
Akhurst v. Jackson,	267	Avarine v. Brown,	374, 375
Aldborough (Earl of) v. Trye,	125	Ayles v. Cox,	250, 350
Alder v. Ward,	406	Aylesford's (Earl of) case,	180
Alexander v. Godwin,	312	Aylett v. Ashton,	72, 351
——— v. Wellington (Duke of),	397	Ayliffe v. Tracey,	83
Allen v. Bennet,	161, 165	Backhouse v. Mohun,	137, 305
——— v. Hilton,	321	Baden v. Pembroke (Countess of),	47
Alley v. Deschamps,	321	Baglehole v. Walters,	251
Allison v. Monkwearmouth,	17	Bagshawe v. Eastern Counties Rail-	
Alvanley v. Kinnaird,	215	way Company,	154
Ambrose v. Nott,	25	Bailey v. Collett,	389
Anderson v. Higgins,	359	Baker v. Paine,	223
Andrew v. Andrew,	373	Baldey v. Parker,	239
Anon. v. Skelton.	368	Baldwin v. Society for Diffusing	
——— v. Walford,	33, 34	Useful Knowledge.	245
——— 9 Hare, Appx. 11,	327	Ball v. Coggs,	22
——— 1 Mad. Ch. 411, n.	18	——— v. Storie,	215
——— 1 Salk. 170,	297	Ballard v. Way,	250
——— cited in Kimberly v. Jennings,		Balmanno v. Lumley,	351, 369
6 Sim. 351,	330	Bannerman v. Clarke,	384
2 Ves. Sen. 629,	18	Barker v. Hill,	47
6 Ves. 24,	108	——— v. Hodgson,	143, 269
Anson (Lord) v. Hodges,	394	Barkworth v. Young,	60, 156, 159, 161,
——— v. Towgood,	264	168, 169, 297, 298	
Anspach (Margravine of) v. Noel,	364, 365	Barnett v. Wheeler,	101
Arglasse v. Muschamp,	25	Barnley v. Eastern Counties Rail-	
Armiger v. Clarke,	133	way Company.	327
Arundell (Lady) v. Phipps,	14	Barnwell v. Harris,	257
Ashton v. Wood,	345, 358	Barr v. Gibson,	263
Ashworth v. Mounsey,	360	Barraud v. Archer,	350
Askew v. Millington,	413	Barret v. Blagrave,	321, 330
Atkinson v. Ritchie,	143, 269	Barrett v. Ring,	114
——— v. Smith.	239	Barrington, Ex parte,	1, 363

Barrington v. Horn,	293	Boardman v. Mostyn,	282, 286, 334
Bartlett v. Purnell,	164	Boehm v. Wood,	337, 368
Basevi v. Serra,	278	Bold v. Hutchinson,	84
Basket v. Basket,	300	Bolingbroke's (Lord) case,	138
Baskett v. Cafe,	158	Bonner v. Johnston,	391, 392, 393
Bateman v. Murray,	405	Bonnet v. Sadler,	54
Baxendale v. Seale,	108, 110, 215	Booth v. Pollard,	20
Baxter v. Burfield,	50	Boothby v. Walker,	393
——— v. Conolly,	17	Borell v. Dann,	125, 130
——— v. Taylor,	36	Borneman v. Tooke,	312
Bayley v. Leominster (Corporation of),	404	Bostock v. North Staffordshire Railway Company,	150
Bayly v. Merrel,	201	Boswell v. Mendham,	259
——— v. Tyrrell,	57	Bower v. Bright,	344
Baynham v. Guy's Hospital,	314, 403,	——— v. Cooper,	99, 130
	404	——— v. Cator,	157
Beales v. Rokeby (Lord),	47	Boyes v. Liddell,	368, 370
Beardmer v. London and North Western Railway Company,	271	Boys v. Ayerst,	79, 81, 82, 137
Beaton v. Nicholson,	83, 158, 289	Bozon v. Farlow,	17, 18
Beaufort (Duke of) v. Glynn,	335, 371	Brace v. Wehnert,	20
Beaumont v. Dukes,	270	Bradley v. Munton,	357
Beckley v. Newland,	3, 398	Bramley v. Alt,	209, 210
Bedford (Duke of) v. British Museum (Trustees of the),	118	——— v. Teal,	392
Beech v. Ford,	8	Braybrooke (Lord) v. Inskip,	255, 371, 374
Beeston v. Stuteley,	142, 292	Brealey v. Collins,	8, 12, 197
Bell v. Howard,	110, 135, 305	Brennan v. Bolton,	176
——— v. O'Reilly,	338	Brewster v. Clarke,	408
Bellringer v. Blaggrave,	114	Briderg v. Rice,	113
Beman v. Rufford,	57, 154	Bridges v. Hitchcock,	403
Bennet v. Wade,	73	——— v. Robinson,	384
Bennet College v. Carey,	371	Bridgman v. Green,	110
Bennett v. Fowler,	100, 138, 358	Bright v. North,	154
——— v. Rees,	371	Brinkley v. Hance,	111
Benson v. Lamb,	318	Briscoe v. Brett,	368
Bentley v. Craven,	248	Bristow v. Wood,	261
Berkeley v. Dauh,	375	Brocklebank v. Whitehaven Junction Railway Company,	9
——— v. Hardy,	41	Bromley v. Jefferies,	94, 134
Berry v. Young,	312	Brooke v. Anon.,	373
Bettesworth v. St. Paul's (Dean and Chapter of),	4, 143, 295	——— v. Champernowne,	379, 389
Bickner v. Milner,	373	——— v. Garrod,	321
Bigg v. Strong,	164	——— v. Hewitt,	58, 280
Bilbie v. Lumley,	224	——— (Lord) v. Rounthwaite,	197, 353
Binks v. Rokeby (Lord),	351, 355, 386,	Brookes v. Whitworth (Lord),	39
	388	Broome v. Moncke,	49
Birce v. Bletchley,	170	Brown v. Raindle,	48
Birch v. Joy,	388	——— v. Tighe,	402, 403, 404
——— v. Podmore,	383	Browne v. London Necropolis Company,	52
Bird v. Boulter,	165	——— v. Warner,	291
Blachford v. Kirkpatrick,	181, 366	Brumfit v. Merton,	342
Blackburn v. Stace,	393	Bryan v. Wooley,	293
Blacklow v. Laws,	261, 362	Bryant v. Busk,	99, 281, 394
Blagden v. Bradbear,	99, 158, 170	Buck v. Lodge,	393
Blakemore v. Glamorganshire Canal Navigation,	333	——— v. Whalley,	293
Blaydes v. Calvert,	337	Buckhouse v. Crosby,	305
Bleakley v. Smith,	161	Buckland v. Hall,	281, 334
Blore v. Sutton,	98, 163, 177, 395	Buckle v. Mitchell,	136, 258
Blosse v. Clanmorris (Lord),	261	Buckmaster v. Harrop,	48, 137, 164, 171, 177, 183, 238
Blount v. Blount,	389	Bullock v. Bullock,	48
Blundell v. Brettagh,	96, 414	Bunn v. Guy,	18
Blyth v. Elmhurst,	368, 369	Burgess v. Wheate,	296

Burke v. Dawson,	258	Clarke v. Faux,	311
— v. Smyth,	323	— v. Grant,	172, 212, 219, 232
Burned v. Laing,	337	— v. Moore,	219, 302, 322
Burnell v. Brown,	363, 384	— v. Price,	245
Burroughs v. Oakley,	364, 392, 393	— v. Wilson,	391
Burrowes v. Lock,	130, 193	Clarkson v. Hanway,	110
Burton v. Todd,	378	Clayton v. Ashdown,	133
Butcher v. Stapely,	180	— v. Illingworth,	7
Butler v. Mulribill,	112	— v. Newcastle (Duke of),	291, 401
— v. Portarlington (Lord),	394, 406	— v. Nugent (Lord),	92
— v. Powis,	28, 137	Cleaton v. Gower,	123, 138, 141, 345
Butterfield v. Heath,	258	Clegg v. Edmondson,	315, 316, 324
Buxton v. Lister,	4, 13, 14, 18, 19, 90	Clerk v. Wright,	166, 186
Byrne v. Acton,	114	Clermont (Viscount) v. Tasburgh,	204, 352
Cadman v. Horner,	203	Clifford v. Turrell,	11, 186, 232
Calcraft v. Roebuck,	363, 384	Clinan v. Cooke,	93, 98, 164, 166, 182, 183, 213, 229, 230, 231
Caledonian and Dumbartonshire Junction Railway Company v. the Magistrates of Helensburgh,	61, 64, 65	Clive v. Beaumont,	79, 367, 368
Callaghan v. Callaghan,	103, 128	Clowes v. Higginson,	217
Calverley v. Williams.	221, 222	Cockell v. Taylor,	128
Campbell v. Fleming,	308, 309, 364	Cockerell v. Cholmeley,	224
— v. Ingilby,	44, 278, 279	Coffin v. Cooper,	371
— v. Leach,	134	Cohen v. Wilkinson,	154
— v. London and Brighton Railway Company,	316	Cole v. Sims,	27, 31, 59
Candler v. Carden,	18	— v. White,	186
Cann v. Cann,	349, 355	Coleman v. Eastern Counties Railway Company,	151, 153
Cannel v. Buckle,	3, 5	— v. Upcot,	81, 137
Cappur v. Harris,	11	Coles v. Trecothick,	129, 162, 164, 165, 267
Carey v. Stafford,	293	Collett v. Hever,	39
Carleton v. Leighton,	401	Collier v. Brown,	130
Carne v. Mitchell,	291	— v. Jenkins,	49, 344, 350
Carolan v. Brabazon,	247, 294, 306	Collins v. Plumb,	17
Carrodus v. Sharp,	379	— v. Plummer,	134, 331
Carter v. Carter,	267	Colt v. Netterville,	12
— v. Ely (Dean of),	306, 315, 317	Colton v. Wilson,	260
Casamajor v. Strode,	238	Columbine v. Chichester,	290
Cass v. Ruddle,	267	Colyear v. Mulgrave (Countess of),	41
Cator v. Pembroke (Earl of),	355	Colyer v. Clay,	172
Cattell v. Corral,	257, 260	Const v. Harris,	303
Causton v. Macklew,	258	Cook v. Field,	56, 397
Chadwick v. Maden,	34, 69	— v. Richards,	235
Chamberlain v. Lee,	371, 372	Cooke v. Clayworth,	112
Chambers v. Gausen,	404	— v. Cooke,	39
— v. Griffiths,	238	— v. Oxlee,	80
Champernowne v. Brooke,	389	— v. Tombs,	186
Champion v. Plummer,	94	Cookes v. Mascall,	87
Cheslyn v. Dalby,	418	Coombs v. Mansfield,	408
Chester v. Urwick,	173	Cooper v. Denne,	253
Chesterman v. Mann.	135, 136, 405	— v. Smith,	168
Chichester v. Macintyre,	94	Cooth v. Jackson,	96, 108, 143, 158, 178, 189
Child v. Abingdon (Lord),	389	Cope v. Parry,	39
— v. Comber,	137, 157, 168, 183	Copper Mining Comp. v. Beach,	280, 404
— v. Godolphin,	156	Corder v. Morgan,	32
Chilliner v. Chilliner,	27, 29, 31	Cornfoot v. Fowke,	193, 210
Chissum v. Dewes,	17	Corraill v. Cattell,	360
Clapham v. Shillito,	197	Coslake v. Till,	17, 315, 317
Claringbould v. Curtis,	13	Cosser v. Collinge,	100
Clark v. Glasgow Assurance Company,	20	Coster v. Turner,	320
Clarke v. Elliott,	391	Costigan v. Hastler,	118, 311
		Cotton v. Wilson,	47

Counter v. Macpherson,	265, 275, 326	Dixon v. Astley,	365, 392, 393
Couturier v. Hastie,	263	Dobell v. Hutchinson,	167, 169, 347
Cowley v. Watts,	101, 160	—— v. Stevens,	202
Cowpe v. Bakewell,	383, 387	Dodgeley v. Kinnersley,	4
Cox v. Middleton,	98, 202	Doe d. Gray v. Stanion,	99
Cripps v. Jee,	226	—— Lambourne v. Pedgriph,	160
Crockford v. Alexander,	335	—— Lyster v. Goldwin,	91
Crofton v. Ormsby,	58, 278, 316, 322	—— Mann v. Walters,	91
Crofts v. Middleton,	73	—— Nash v. Birch,	307
Crompton v. Melbourne (Lord),	355	—— Williams v. Evans,	56
Croome v. Lediard,	225, 239	Dolman v. Nokes,	208
Crosbie v. Tooke,	51, 53, 280, 281	Doloret v. Rothschild,	4, 8, 11, 315
Cross v. Sprigg,	86	Doo v. London and Croydon Rail-	
Crosse v. Keene,	239, 251	way Company,	9
—— v. Lawrence,	239, 251	Doogood v. Rose,	274
Crow v. Rogers,	41	Dorison v. Westbrook,	12
Crowder v. Austin,	209	Douglass v. London and North	
Croyston v. Banes,	157	Western Railway Company,	10, 311
Cruse v. Nowell,	342	Dowell v. Dew,	51, 53, 55, 58, 180
Crutchley v. Jerningham,	390, 393	Downs v. Collins,	99, 241
Crutwell v. Lye,	17, 331	Drewe v. Corp,	349
Cubitt v. Blake,	278, 320	—— v. Hanson,	347
Cud v. Rutter,	11	Drummond v. Bolton (Duke of),	298
Cuddee v. Rutter,	292	Drysdale v. Mace,	201, 341
Cudden v. Cartwright,	114	Du Biel v. Thompson,	89, 165
Curling v. Flight,	100, 358, 369, 373	Duke v. Andrews,	79
Curtis v. Buckingham (Marquis of),	335	—— v. Barnett,	359
Cutler v. Simons,	365, 392, 393	—— v. Exon (Mayor of),	51
Cuttis, Ex parte,	1, 170	Duncan v. Topham,	82
—— v. Thodey,	33, 308, 325	Duncuft v. Albrecht,	12
Da Costa v. Davis,	297	Dundass v. Dutens,	172, 184
Dakin v. Cope,	387	Dunlop v. Higgins,	82
Dalby v. Pullen,	237, 371	Durham (Dean of) Ex parte,	384
Dale v. Hamilton,	174	Dutton v. Poole,	45
—— v. Lister,	138	Dyas v. Cruise,	58, 140, 164
Daniel v. Adams,	293	Dyer v. Hargrave,	200, 201, 248, 249,
Daniels v. Davison,	93		354, 387
Darbey v. Whittaker,	17, 95, 96	Dykes v. Blake,	239, 340, 348
Darlington v. Hamilton,	350, 360	Dyson v. Hornby,	379, 383
Davenport v. Bishopp,	43, 44, 242	Eads v. Williams,	97, 316, 321, 325
Davies v. Cooper,	208	Early v. Garrett,	192, 251
—— v. Fitton,	229	East Anglian Railway Company v.	
Davis v. Abraham,	208	Eastern Counties Railway Com-	
—— v. Hone,	2, 119, 220, 273, 294	pany,	150, 151
—— v. Jones,	293	East India Company v. Donald,	190
—— v. Marlborough (Duke of),	125	East India Company v. Nuthumba-	
—— v. Symonds,	106, 305	doo Veerasawmy Moodelly,	179, 186,
Davy v. Barber,	266, 389		188
Dawes v. King,	194	East India Company v. Vincent,	23
Dawson v. Brinckman,	366	Eastern Counties Railway Com-	
Day v. Newman,	129	pany v. Hawkes,	10, 64, 150, 152, 154
Deane v. Izard,	173	Eaton's case,	297
—— v. Rastron,	111, 127	Eaton v. Laughter,	297
De Medina v. Norman,	292	—— v. Lyon,	405, 406
Denne v. Light,	124	Echliff v. Baldwin,	334
Denton v. Stewart,	290, 395	Edinburgh, Perth, and Dundee Rail-	
De Rothschild v. Royal Mail Steam		way Company v. Philip,	288
Packet Company,	383	Edwards v. Applebee,	60
Devenish v. Brown,	292, 371	—— v. Burt,	125
Deverell v. Bolton (Lord),	366	—— v. Grand Junction Railway	
De Visme v. De Visme,	379, 381, 383	Company,	61, 121
Dick v. Donald,	343	—— v. Edwards v. McLeay,	191, 207
Dietrichsen v. Colburn,	246	—— v. Warwick (Countess of),	43

Egerton v. Brownlow (Lord),	143	Foster v. Hall,	174
— v. Jones,	373	— v. Mentor Life Assurance	
— v. Mathews,	161	Company,	84
Eldridge v. Porter,	368	Foubert v. Trust,	24
Ellard v. Llandaff (Lord),	111	Fowle v. Freeman,	137, 160
Ellis v. Colman,	290	Fox v. Birch,	390
Elmore v. Kingscote,	94	— v. Mackreth,	128, 208
Elsworthy v. Bird,	411	Frame v. Dawson,	176, 183
Ely (Dean of) v. Stewart,	123	Francis v. Wigzell,	72
Emery v. Grocock,	257	Frank v. Basnett,	339, 355
— v. Pickering,	369	— v. Frank,	107
— v. Wase,	293, 416	Franklin v. Brownlow (Lord),	280
Emmerson v. Heelis,	164, 238	Franklyn v. Lamond,	239
Emmett v. Dewhurst,	229	— v. Tuton,	21
England v. Curling,	303, 407	Franks v. Martin,	90, 103
Enraught v. Fitzgerald,	378, 389	Fraser v. Wood,	372
Errington v. Aynesly,	19, 294	Frederick v. Coxwell,	292, 293, 295
Esdaile v. Stephenson,	350, 374, 378,	Freebody v. Parry,	391
	381	Freeman v. Baker,	192
Esposite v. Bowden,	143, 269	— v. Cooke,	84
Evans v. Edmonds,	192	Freer v. Hesse,	258
— v. Harris,	157	Freme v. Wright,	101
— v. Jackson,	39	French v. Macale,	26, 29, 30
— v. Richardson,	145	Frost v. Beaven,	73
— v. Walshe,	117	— v. Moulton,	159
Eyre v. Menro,	60	Fulham v. McCarthy,	33
Eyston v. Simmons,	372	Fuller v. Wilson,	193, 210
Eyton v. Dicken,	258	Furnival v. Crew,	59, 402, 403
Faine v. Brown,	121	Gabriel v. Smith,	342
Fane v. Spencer,	100	Gage v. Acton,	3
Featherstonough v. Fenwick,	53	— v. Newmarket Railway Com-	
Fellmakers' Company v. Davis,	41	pany,	150, 288
Fellowes v. Gwydyr, (Lord)	51, 54, 203	Gale v. Lindo,	83
Fells v. Read,	14	Galton v. Emuss,	47
Fenelly v. Anderson,	134	Gardner, Ex parte,	325
Fenning v. Humphrey,	25	Garrard v. Grinling,	218
Fenton v. Browne,	197, 393	Gartside v. Isherwood,	110
Ferguson v. Tadman,	346, 386	Gaskarth v. Lowther (Lord),	76
Faversham (Lord) v. Watson,	276	Gaston v. Frankum,	72, 165, 368
Fewster v. Turner,	272	Geddes v. Wallace,	303
Field v. Hutchinson,	156	Gedye v. Montrose (Duke of),	25
Fife v. Clayton,	217	Gee v. Pearse,	323
Fildes v. Hooker,	100, 351, 373	Gell v. Watson,	391
Finch v. Salisbury (Earl of) and		Gerrard v. O'Reilly,	30
Hawtrey,	27, 58	Gervais v. Edwards,	240, 243, 417
Firth v. Greenwood,	163, 321	Gibbins v. North-Eastern Metropo-	
Fleetwood v. Green,	357	litan District Asylum,	79, 160, 370
Fletcher v. Fletcher,	410	Gibbons v. Gaunt,	224
Flight v. Barton,	100, 202	Gibson v. Carruthers,	53
— v. Bolland,	133, 137	— v. Clarke,	370, 390, 391
— v. Booth,	349	— v. D'Este, 191, 195, 201, 207,	340
Flint v. Brandon,	20	— v. Goldsmid,	274
— v. Woodin,	203, 209, 364	— v. Paterson,	313
Flood v. Finlay,	55	— v. Spurrier,	238
Floyd v. Buckland,	180	Gilliland v. Henderson,	18
Fludyer v. Cocker,	387	Glengal (Lord) v. Barnard, 159, 164, 165	
Foligno v. Martin,	339	Glengal (Lord) v. Thynne,	159, 164
Ford v. Compton,	58, 338	Godson v. Turner,	358
— v. Heely,	32	Goilmere v. Battison,	60
Fordyce v. Ford,	320, 335, 349, 363	Goman v. Salisbury,	305
Forsyth v. Manton,	413	Gompertz v. Anon.,	369
Fortescue v. Heunah,	60	Gooday v. Colchester, etc., Railway	
Foster v. Deacon,	355, 386	Company,	63, 64

Goodman v. Griffiths,	94, 169	Hamilton v. Grant,	124, 127, 134
Goodwin v. Fielding,	58, 115	Hammersley v. Du Biel,	83, 89, 169, 185
Gordon v. Ball,	369	Hancock v. Hancock,	278
Gordon (Lord) v. Hertford (Marquis of),	219	Hanks v. Palling,	359
Gordon v. Smart,	283	— v. Pulling,	263
— v. Trevelyan,	98	Harding v. Cox,	54
Goring v. Nash,	43, 242	Hare v. Burges,	280, 403, 404
Gosbell v. Archer,	162, 164, 169	— v. Shearwood,	226
Goss v. Nugent (Lord),	305, 306	Harford v. Purrier,	265, 387
Gould v. Kemp,	116	Hargreaves v. Wright,	40
Gourlay v. Somerset (Duke of),	96, 97,	Harnett v. Yielding,	105, 113, 114, 139, 403
	417	Harrington v. Wheeler,	320, 322
Golymer v. Paddiston,	60	Harris v. Ingledew,	47
Graham v. Oliver,	141, 360	— v. Kemble,	194, 202, 204
Grant v. Munt,	200, 354	— v. Loyd,	225
Granville v. Betts,	242	Harrison v. Gardner,	331
Great Northern Railway Company v. Eastern Counties Railway Company,	57	Hartley v. Smith,	259
Great Northern Railway Company v. Manchester, Sheffield and Lincolnshire Railway Company,	102, 246	Harvey v. Graham,	305
Great Western Railway Company v. Birmingham and Oxford Junction Railway Company,	138, 244, 292, 334	Harvy v. Ashley,	277
Great Western Railway Company v. Rushout,	153	Harwood v. Tooke,	398
Greaves v. Wilson,	341	Hatton v. Grey,	136
Green v. Folgham,	407	Havelock v. Geddes,	312
— v. Low,	247, 274	Hawkes v. The Eastern Counties Railway Company,	7, 117, 121, 135, 288, 292
— v. Pulsford,	260	Hawkins v. Holmes,	162, 186
— v. Smith,	290	Haydon v. Bell,	362
Greenaway v. Adams,	395	Haywood v. Cope,	93, 108, 117
Greenhalgh v. Manchester and Birmingham Railway Company,	63, 296	Heap v. Tonge,	107
Greenwood v. Churchill,	381	Heaphy v. Hill,	322
Gregg v. Wells,	84	Hearne v. Tenant,	314
Gregory v. Mighill,	180, 189	Heathcote v. North Staffordshire Railway Company,	331
— v. Wilson,	282, 283, 285, 286	Helsham v. Langley,	110, 215, 220
Gregson v. Riddle,	314	Hemming v. Mayo,	328
Grenningham v. Ewer,	300	Henkle v. Royal Exchange Assurance Company,	222, 223
Grey v. Hesketh,	292	Heriot's Hospital (Feoffees of) v. Gibson,	271
Griffin v. Griffin,	275	Iern v. Nichols,	210
Griffiths v. Spratley,	128, 130	Hershey v. Giblet,	58, 98
Grove v. Bastard,	260	Hertford (Marquis of) v. Boore,	321
Groves v. Groves,	25	Hervey v. Audland,	25
Guest v. Homfray,	322	Hesse v. Briant,	111
Gunter v. Halsey,	171, 176	Hibbert v. Hibbert,	18
Gwillim v. Stone,	395	Hibblethwaite v. M'Morine,	292
Gwynn v. Lethbridge,	217	Hick v. Phillips,	250, 350, 394
Haberdashers' Company v. Isaac,	110	Higgins v. Senior,	67, 70
Halfpenny v. Fotherley,	87	Higginson v. Clowes,	214, 218, 228
Hall v. Betty,	100	Hill v. Barclay,	283
— v. Cazenove,	312	— v. Buckley,	113, 138, 349
— v. Hall,	78	— v. Gomme,	41, 42, 45, 46, 134, 301, 305, 306
— v. Hardy,	293, 414	Hills v. Croll,	246
— v. Laver,	35, 302, 365	Hincksman v. Smith,	125
— v. Warren,	73, 97	Hinton v. Hinton,	47, 48
Hallett v. Middleton,	291	Hipwell v. Knight,	313, 314, 325
Halsey v. Grant,	347, 350	Hircy v. Birch,	18
		Hitchcock v. Giddings,	222, 262
		Hitchens v. Landor,	55
		Hobbs v. Hull,	411
		Hobson v. Trevor,	27, 398
		Hodges v. Blaggrave,	280, 404

Hodges v. Horsfall,	103	Jackson v. Jackson,	97
Hodgkinson v. Wyatt,	235	____ v. Lever,	267
Hodgson v. Hutchinson,	80, 82, 169	____ v. Lowe,	167
Hoggart v. Scott,	133, 136, 372	____ v. Pesked,	36
Holden v. Hayn,	35, 302	____ v. Petrie,	25
Holland v. Eyre,	78	____ v. Saunders,	406
Hollis v. Whiteing,	173	____ v. Sedgwick,	303
Holman v. Johnson,	144	Jalabert v. Chandos (Duke of),	38, 58
Holmes v. Eastern Counties Railway Company,	105, 285	James v. Shore,	238
Holt v. Holt,	15, 48	Jameson v. Stein,	84
Holyland, Ex parte,	73	Jeffreys v. Jeffreys,	25
Honeyman v. Marryatt,	81, 160, 314	Jenkins v. Hiles,	357, 361, 362
Hook v. Kinnear and Philips,	41	____ v. Parkinson,	337, 345, 395
Hooper, Ex parte,	176, 183	Jennings v. Broughton,	196, 199
Hopcraft v. Hickman,	94	____ v. Hopton,	370
Hope v. Hope,	24, 134, 247, 410	Jervoise v. Northumberland (Duke of),	254, 255
Horniblow v. Shirley,	350	Jeudwine v. Agate,	28
Horsfall v. Garnett,	77	____ v. Alcock,	373
Hosier v. Read,	157	Job v. Bannister,	404
Hotham v. East India Company,	274	Johnson v. King,	79
Houghton v. Lees,	25, 399	____ v. Legard,	38, 48, 113, 136, 258
Howard, In re,	48	____ v. Nott,	110
____ v. Braithwaite,	163	____ v. Shrewsbury and Birmingham Railway Company,	23, 57, 134, 145
____ v. Hopkins,	26, 28, 58	____ v. Smiley,	343
____ v. Hudson,	84	Johnstone v. Hall,	36
____ v. Knightly,	342	Jones v. Evans,	142
____ v. Okeover,	156	____ v. Green,	27, 30
Howell v. George,	216, 292, 293	____ v. How,	60, 299
____ v. Howell,	385	____ v. Jones,	19
Howland v. Norris,	347, 379	____ v. Lees,	116
Hoy v. Smythies,	311	____ v. Littledale,	69
Hoyle v. Livesey,	268	____ v. Martin,	60
Hubert v. Treherne,	162	____ v. Mudd,	378
____ v. Turner,	162	____ v. Roe,	3, 397
Huddleston v. Briscoe,	75, 160	Jordan v. Sawkins,	54, 157, 226, 306
Hudson v. Bartram,	314, 325, 334	Joynes v. Statham,	216, 231
Hughes v. Morris,	408	Jumpson v. Pitcher,	375
____ v. Parker,	99		
____ v. Statham,	407	Keeble v. Dennis,	327
Hulme v. Tenant,	72	Keisselbrack v. Livingstone,	235
Hume v. Bentley,	361	Kemble v. Kean,	103, 245
Humphreys v. Hollis,	32, 72	Kemeys v. Proctor,	164
____ v. Horne,	338	Kendall v. Beckett,	125, 395
Hunter v. Daniel,	274, 309	Kennedy v. Lee,	76, 93
Hyde v. Skinner,	403	Kenney v. Wexham,	8, 11, 268
____ v. Watts,	307	Kensington (Lord) v. Phillips,	91, 98
____ v. White,	399	Kenworthy v. Schofield,	164
____ v. Wrench,	80	Ker v. Clobery,	351
____ v. Wroughton,	370	Kerneys v. Hansard,	110
Iggulden v. May,	402, 403	Kien v. Stukeley,	131
Ilchester (Lord), Ex parte,	305	Kimberley v. Jennings,	124, 245
Inge v. Birmingham, Wolverhampton and Stour Valley Railway Company,	10, 305	Kine v. Balfe,	180
Inge v. Lippingwall,	305	King v. King,	311, 391
Irnham (Lord) v. Child,	54, 226	____ v. Wilson,	318, 324, 349, 354
Isherwood v. Oldknow,	35	Kingley v. Young,	69
Ives v. Metcalfe,	415	Kintrea v. Preston,	100
Jackson's case,	58	Kirk v. Bromley Union,	22, 179
Jackson v. Cocker,	12	Knatchbull v. Grueber,	282, 284, 347, 348, 366
		Knight v. Crockford,	162
		Knollys v. Hewitt,	58

Knowles v. Haughton,	407	Lowes v. Lush,	258, 261, 280
Lacey, Ex parte,	136	Lowndes v. Lane,	200
Lachlan v. Reynolds,	352	Lowther v. Andower (Viscountess of),	38
Lacon v. Mertins,	47, 171, 183	——— v. Lowther (Lord),	14, 130
Laniprell v. Bellericay Union,	312	Lucas v. Commerford,	19
Lancashire and Carlisle Railway Company v. North Western Rail- way Company,	148, 331, 332	——— v. Godwin,	312
Lane v. Debenham,	309	——— v. James, 78, 79, 163, 250, 253,	357
——— v. Newdigate,	21, 333	Luders v. Anstey,	88
Lanesborough (Lady) v. Ockshott,	305	Lukey v. Higgs,	122
Langford v. Pitt,	371	Lumley v. Wagner,	124, 245, 329, 330
Lassence v. Tierney,	184	Lyddal v. Weston,	256
Laughter's case,	297, 298	Lyde v. Mynn,	399
Lawder v. Blachford,	116, 117	Lynn v. Chaters,	14
Lawrenson v. Butler,	139	Lyons v. Blenkin,	46
Lawton v. Campion,	107	Lysney v. Selby,	198
Laythoarpe v. Bryant,	159, 161	Lytton v. Great Northern Railway Company,	243
Leake v. Morrice,	173	Macbryde v. Weekes,	211, 316, 319
——— v. Morris,	173	McCallan v. Mortimer,	146
Lechmere v. Brazier,	320	McCalmont v. Rankin,	408, 409
Lees v. Nuttall,	69	McCulloch v. Gregory,	260, 309
Legal v. Miller,	217	Macgregor v. the Official Manager of the Dover and Deal Railway Company,	150
Le Grand v. Whitehead,	368	Mackreth v. Marler,	314, 320
Leigh (Lord) v. Ashburton (Lord),	32	——— v. Symmons,	396
Lemon v. Napper,	5, 405	Maclean v. Dunn,	164
Leominster Canal Company v. Shrewsbury and Hereford Rail- way Company,	9, 65, 155	Macnamara v. Williams,	32
Leroux v. Brown,	25, 155	McQueen v. Farquhar,	260, 348
Leslie v. Tompson,	215	Madely v. Booth,	350
Lesturgeon v. Martin,	357	Maester v. Gillespie,	238
Levy v. Lindo,	326, 334	Magee v. Atkinson,	69
Lewin v. Guest,	238, 374	Magennis v. Fallon, 257, 325, 353, 372,	373
Lewis v. Bond,	282, 283	Magram v. Archbold,	30, 114
——— v. Lechmere (Lord),	10, 127, 315	Main v. Melbourn,	183
——— v. Loxam,	373	Malins v. Freeman,	215
Lightfoot v. Heron,	59, 110, 112	Manning, Ex parte,	389
Limondson v. Sweed,	171	Manser v. Back,	164, 213, 215, 229
Lincoln v. Arcedeckne,	261	Margetson v. Wright,	201
Lindsay v. Lynch,	175, 188, 190	Marsh v. Milligan,	13, 102, 292
Lindsey (Earl of) v. Great North- ern Railway Company,	60, 63, 177, 296	Marshall v. Broadhurst,	50
Lingan v. Simpson,	407	——— v. Collett,	224
Lloyd v. Collett,	314, 320	——— v. Sladden,	69
——— v. Lloyd,	277, 278	Martin v. Cotter,	197, 257, 341, 342
——— v. Loaring,	14	——— v. Mitchell,	72, 110, 137, 293
——— v. Rippingale,	314	——— v. Nutkin,	329
Logan v. Wienholt,	28, 60	——— v. Pyerost,	233
London and Birmingham Railway Company v. Winter,	177, 219, 220, 229	Martyn v. Hind,	45
London (City of) v. Mitford,	316, 405	Mason v. Armitage,	157, 214
——— v. Nash,	17, 19, 117, 145, 345	——— v. Franklin,	38
——— v. Pugh,	30	Matthews v. Dana,	369
Lord v. Lord,	170	Maunsell v. White,	84, 85, 87
——— v. Stephens,	273	Maw v. Topham,	113, 141, 142
Lovell v. Hicks,	191, 192	Meadows v. Tanner,	209
Lovelock v. Franklyn,	274	Mellish v. Motteux,	251
Lowe v. Manners,	369	Meredith v. Wynn,	277
——— v. Swift,	36	Mestaer v. Gillespie,	171
		Meux v. Maltby,	37, 58
		Mews v. Carr,	164
		Mexborough (Earl of) v. Bower,	333

Meynell v. Surtees, 7, 57, 75, 76, 78, 79,		Nagle v. Baylor, 112
	80, 97	National Exchange Company v. Drew, 193, 194, 210
Mildmay v. Hungerford, 224		Neale v. Mackenzie, 113, 138, 139, 281
Milligan v. Cooke, 138, 351		— v. Neale, 181
— v. Mitchell, 333		Neap v. Abbott, 215
Milner v. Field, 96		Needham v. Kirkman, 60
Miles v. Gery, 3, 95, 97		— v. Smith, 60
Milward v. Thanet (Earl), 320		Neill v. Morley, 73
Minchin v. Nann, 386		Nelson v. Bridges, 346, 355
Minor, Ex parte, 264		Nelthorpe v. Holgate, 34, 52, 69, 310, 344, 350
Mitford v. Mitford, 278		Nesbitt v. Meyer, 267, 268
Moens v. Heyworth, 192		Neville v. Wilkinson, 83
Mole v. Smith, 32		Newberry v. James, 16, 330, 407
Money v. Jordan, 84, 85		Newham v. May, 355
Monk v. Huskisson, 381		Newman v. Rodgers, 315
Monro v. Taylor, 92, 94, 303, 313, 323, 359, 379.		Newmarch v. Brandling, 333
Montacute (Viscountess) v. Maxwell, 86, 172		Nicholson v. Knapp, 335
Montefiori v. Montefiori, 83		Nickels v. Hancock, 117, 241, 414, 415, 416
Montgomery v. Reilly, 88		Noel v. Hoy, 372
Moore v. Blake, 320		Nokes v. Kilmorey (Lord), 318, 319
— v. Crofton, 307		Norfolk (Duke of) v. Worthy, 352
— v. Edwards, 157, 158		North v. Ansell, 278
— v. Folly, 403		North British Railway Company v. Tod, 271
— v. Hart, 87		Norton v. Mascall, 414
More v. Morecomb, 298		— v. Searle, 13
Morehouse v. Colvin, 86		— v. White, 49
Morgan v. Birnie, 96		— v. Wood, 86
— v. Holdorf, 137		Norwich (Mayor of) v. Norfolk Railway Company, 147, 150, 151, 292
— v. Milman, 7, 9, 36, 96, 177, 178		Nott v. Hill, 131
— v. Rhodes, 51, 53		— v. Riccard, 318
— v. Shaw, 369, 391		Nunn v. Truscott, 283
Morison v. Turnour, 161		Nurse v. Seymour (Lord), 69, 272
Morley v. Cook, 308, 343, 352, 375		Nutbrown v. Thornton, 11, 13, 15
Morphett v. Jones, 176, 180, 190		
Morris v. Coleman, 245		O'Conor v. Spaight, 304
— v. McNeil, 337		Ogilvie v. Foljambe, 92, 101, 161, 367
— v. Stephenson, 293		O'Herlihy v. Hedges, 53, 184
Morrison v. Arnold, 47, 260		Okill v. Whittaker, 225
Morse v. Faulkner, 400		Oldfield v. Round, 249
— v. Merest, 95, 323, 417		Omerod v. Hardman, 361
Mortimer v. Capper, 132, 267		Onslow v. Londesborough (Lord), 280
— v. Orchard, 188		Ord v. Johnston, 7, 25, 134
— v. Shorhall, 224		— v. Noel, 114
Mortlock v. Buller, 2, 59, 111, 113, 115, 137, 371		O'Reilly v. Thompson, 183, 186
Moseley v. Virgin, 20, 311		Ormond (Lord) v. Anderson, 98, 137
Moss v. Bainbridge, 41		O'Rourke v. Percival, 142
— v. Matthews, 368, 370		Osbaldiston v. Askew, 347
Moxhay v. Inderwick, 122		Osborne v. Harvey, 342, 365, 392
Moyses v. Little, 51		Osgood v. Strode, 43
Mumford v. Oxford Railway Company, 36		Osmond v. Fitzroy, 73
Mummery v. Paul, 17		Otway v. Braithwaite, 137
Mundy v. Jolliffe, 177, 181, 188, 189, 286		Owen v. Davies, 73, 389
Munro v. Taylor, 251		— v. Thomas, 92, 93
Munt v. Shrewsbury and Chester Railway Company, 153		Oxenden v. Falmouth (Lord), 383
Murray v. Barlee, 72		
— v. Parker, 222, 224		Padwick v. Platt, 33
Mussel v. Cooke, 158		Page v. Adams, 308
Myers v. Watson, 271		— v. Broom, 49, 280
		Pain v. Coombs, 180, 285

Paine v. Meller,	264, 267	Powell v. Dillon,	166
Painter v. Newby,	310, 356	—— v. Doubble,	352
Palmer v. Scott,	81, 135	—— v. Knowler,	145
Paramore v. Greenslade,	264	—— v. Lloyd,	280, 334
Paris Chocolate Company v. Crystal Palace Company,	97, 104, 307	—— v. Martyr,	379
Parken v. Whitby,	145, 220, 416	Prebble v. Boghurst,	28, 119
Parker v. Frith,	316	Prendergast v. Turton,	315
—— v. Palmer,	107	Preston v. Liverpool, Manchester, and Newcastle Railway Company,	63, 65, 66
—— v. Serjeant,	82	Price v. Assheton,	86, 99, 280, 281, 307, 334
—— v. Smith,	185, 187	—— v. Coombs,	284
—— v. Taswell,	103	—— v. Dyer,	217, 225, 226, 227, 306
Parkin v. Thorold,	312, 313, 314, 318, 322, 325	—— v. Griffith,	93, 238
Parkinson v. Lee,	250	—— v. Macaulay,	193, 201, 343, 350, 352
Partridge v. Strange,	56	—— v. Penzance (Corporation of),	21
Paterson v. Long,	32	—— v. Strange,	256
Paton v. Brebner,	351	—— v. Williams,	417
—— v. Rogers,	368, 369, 373, 378	Pritchard v. Ovey,	91
Paxton v. Newton,	19, 394	Propert v. Parker,	161
Payne v. Banner,	316	Prosser v. Edmonds,	56
Peacock v. Penson,	32, 121, 271	—— v. Watts,	257
Peake, Ex parte,	108	Prothero v. Phelps,	338, 339, 345, 355
Pearce v. Watkins,	33	Pullen v. Ready,	224
Peele, Ex parte,	41	Pulvertoft v. Pulvertoft,	44
Pegg v. Wisden,	318, 325, 365	Pye v. Daubuz,	60
Pember v. Mathers,	172, 232	Pyke v. Pyke,	278
Pembroke v. Thorpe,	15, 21, 120, 179, 186	—— v. Williams,	180
Pen v. Baltimore (Lord),	24, 419	Pym v. Blackburn,	214
Perkins v. Ede,	347	—— v. Campbell,	304
—— v. Thornton,	278	Pyke v. Waddingham,	255, 256, 261
Persse v. Persse,	400	Radcliffe v. Warrington,	313, 318
Petre v. Duncombe,	32	Ramsbottom v. Gosden,	218
Petre (Lord) v. Eastern Counties Railway Company,	63	Ramsden v. Hirst,	352
Phillips v. Buckingham (Duke of),	54	—— v. Hylton,	278
—— v. Clark,	383	Randall v. Hall,	272
—— v. Everard,	49, 280	—— v. Morgan,	84, 169
Phipps v. Child,	273, 359, 362	Ranger v. Great Western Railway Company,	27, 31, 210
Physician's case,	45	Rankin v. Huskisson,	330, 333
Pickard v. Sears,	84	Rawlings v. Dalgleish,	328
Pickering v. Dowson,	251	Rayner v. Grote,	53
—— v. Ely (Bishop of),	23, 134	—— v. Julian,	39
—— v. Pickering,	107	—— v. Stone,	16
Piers v. Lambert,	347	Raynes v. Wyse,	337
Pincke v. Curties,	313, 324, 378	Redding v. Wilkes,	186
Pitcairn v. Ogbourne,	224, 226	Redshaw v. Bedford Level,	106, 402
Playford v. Playford,	124	Rees v. Dacre,	402
Podmore v. Gunning,	173	Regent's Canal Company v. Ware,	10 287, 379, 380
Polhill v. Walter,	195, 203	Reg. v. Birmingham and Oxford Junction Railway Company,	9
Pollard v. Clayton,	14, 16, 20, 316	Revell v. Hussey,	117, 266
Poole v. Hill,	274	Rex v. Hungerford Market Com- pany,	9
—— v. Shergold,	238	—— v. Marsh,	210
Pooley v. Budd,	15	—— v. Scammonden,	233
Pope v. Garland,	202, 249	Reynell v. Sprye,	194, 202
—— v. Roots,	266	Reynolds v. Waring,	188, 318, 319, 338
Portarlington v. Soulby,	25	Rhodes v. Ibbetson,	341
Portman v. Mill,	369, 373	Rich v. Jackson,	228
Portmore (Earl of) v. Taylor,	125		
Portmore (Lord) v. Morris,	226		
Potter v. Commissioners of Revenue,	17		
—— v. Potter,	171		
—— v. Saunders,	58, 82		

Richards v. Porter,	169	Seaman v. Vawdrey,	257
Richardson v. Eyton,	413	Seaton v. Booth,	238
Ricketts v. Bell,	101, 133, 220	— v. Mapp,	315, 317, 341
Ridgway v. Gray,	351, 353	Seaward v. Willock,	274
— v. Wharton,	98, 156, 157, 160, 161, 163, 164, 165, 166, 167,	Selby v. Selby,	163
Right v. Cuthell,	91	Seton v. Slade,	137, 312, 314, 325
Rist v. Hobson,	169	Shackle v. Baker,	17, 331
Roake v. Kidd,	254	Shackleton v. Sutcliffe,	249, 348
Roberts v. Berry,	314	Shannon v. Bradstreet,	135, 177
— v. Marchant,	47	Sharp v. Adcock,	256
— v. Massey,	397	— v. Carter,	55
— v. Wyatt,	307	— v. Milligan,	163, 322
Robertson v. Great Western Rail-way Company,	33	— v. Taylor,	337
— v. Skelton,	264, 383, 386	Shaw v. Fisher,	13, 35, 302, 358
Robinson v. Page,	220, 233, 305, 306	— v. Mackray,	112
— v. Wall,	203	— v. Thackray,	58
Robson v. Collins,	303	Sheffield v. Mulgrave (Lord),	254, 255
Roffey v. Shatcross,	237	Sheffield Gas Consumers' Company v. Harrison,	19
— v. Shollcross,	237	Shelburne (Lady) v. Inchiquin (Lord),	223
Rolfe v. Peterson,	29	Shelly v. Nash,	125
Rondeau v. Wyatt,	171	Shepherd v. Keatley,	360
Rook v. Warth,	15	Sherwin v. Shakspere,	376, 383, 384, 385
Roots v. Dormer (Lord),	238	Shirley v. Davis,	347
Roper v. Bartholomew,	26, 29	— v. Stratton,	111, 347
Rose v. Calland,	256, 361	Shrewsbury and Birmingham Rail-way Company v. London and North-western Railway Company,	115, 124, 144, 147, 148, 323
— v. Cunyngham,	166	Shrewsbury and Birmingham Rail-way Company v. Stour Valley Railway Company,	119
Rosse (Earl of) v. Sterling,	306	Siboni v. Kirkman,	49
Rothschild (De) v. Royal Mail Steam Packet Company,	383	Sidebotham, Ex parte,	1, 363
Routledge v. Grant,	78, 80	— v. Barrington,	371
Rowe v. Teed,	158	Simmonds v. Swaine,	297
— v. Wood,	413	Simmons v. Cornelius,	183
Rowley v. Adams,	383	Simpson v. Denison,	154
Russell v. Darwin,	403	— v. Sadd,	367
Ryan v. Daniel,	400	— v. Savage,	36
Sainsbury v. Jones,	395	Skinner v. McDouall,	79, 93, 158, 160
Sainter v. Ferguson,	25	Sloman v. Walter,	29
Salisbury (Marquis of) v. Great Northern Railway Company,	9	Sloper v. Fish,	253, 261
Salisbury v. Hatcher,	136, 372	Small v. Attwood,	69, 338, 365
Sanders v. Rodway,	410	Smith v. Capron,	100, 367
Sarl v. Bourdillon,	92	— v. Clarke,	67, 203, 209
Saunders v. Cramer,	57, 88	— v. Death,	261
— v. Richards,	39	— v. Garland,	113, 136, 258
Saunderson v. Cockermouth and Workington Railway Company,	21, 103	— v. Harrison,	109, 112, 359
— v. Jackson,	162, 163, 167	— v. Jackson,	392
Savage v. Brockssop,	106	— v. Jeyes,	303
— v. Carroll,	49, 180, 190	— v. Lloyd,	391
— v. Foster,	181	— v. Neale,	81
— v. Taylor,	106	— v. Phillips,	58
Saville v. Saville,	129, 131	— v. Tolcher,	351
— v. Tancred,	14	Smout v. Ilbery,	194
Scargill v. Hurry,	327	Smyth v. Nangle,	404
Schneider v. Heath,	203, 251	Sneesley v. Thorne,	114
— v. Norris,	163	Sober v. Kemp,	32
Scott v. Hanson,	197, 348	Solomon v. Laing,	153
— v. Langstafse,	54	Somerset (Duke of) v. Cookson,	13
— v. Scott,	83	— v. Gourlay,	263
Seagood v. Meale,	168		

Somerville v. Chapman,	402	Stratford v. Bosworth,	75, 99, 159
Souter v. Drake,	100	Street v. Rigby,	417
South-eastern Railway Company v. Knott,	135	Strickland v. Turner,	263, 268
South Wales Railway Company v. Wythes,	7, 20, 22, 98, 103, 104, 183, 241, 417	Stuart (Lord James) v. London and North-western Railway Com- pany,	6, 121, 135, 322, 324
South Yorkshire Railway and River Dun Company v. Great Northern Railway Company,	147, 148	Sturge v. Midland Railway Com- pany,	7, 18, 105
Southampton (Lord) v. Brown,	41	Surcome v. Pinniger,	169, 180, 181, 185
Southby v. Hutt,	342, 359	Sutherland v. Briggs,	138, 181, 189, 190
Southcomb v. Exeter (Bishop of),	321, 323, 324, 395	Sutton, Ex parte,	280
Spain (King of) v. De Machado,	33, 67	——— v. Chetwynd,	43
Sparks v. Liverpool Waterworks Company,	316	Sweet v. Lee,	161
Spence v. Hogg,	58	Swinfen v. Swinfen,	413
Spencer v. Topham,	257	Symonds v. James,	342, 343
Spiller v. Spiller,	335, 336	Symondson v. Tweed,	157
Spratt v. Jeffery,	361		
Springwell v. Allen,	251	Talbot v. Ford,	123
Sprye v. Porter,	56	Tanner v. Smith,	308
Spurrier v. Fitzgerald,	158, 169, 170	Tasker v. Small,	32, 34
——— v. Hancock,	321, 322	Tatham v. Platt,	105
Squire v. Campbell,	229, 271	Tawney v. Crowther,	159, 166
——— v. Whitton,	94	Taylor v. Ashton,	192
Stanhope's (Lord) case,	351	——— v. Beech,	169, 184
Stanley v. Chester and Birkenhead Railway Company,	35, 60, 62, 296, 302	——— v. Brown,	318
——— v. Robinson,	110	——— v. Davis,	330
Stanton v. Tattersall,	250, 352, 364	——— v. Gilbertson,	105
Stapilton v. Stapilton,	107	——— v. Martindale,	341, 360
Stapylton v. Scott,	221, 311, 347	——— v. Neville,	16
Stedman v. Collett,	235	——— v. Portington,	103
Stent v. Bailis,	266	——— v. Salmon,	37, 69
Stephens v. Illoham,	49, 130, 280	——— v. Stibbert,	57
——— v. Olive,	411	Tenant v. Elliott,	146
——— v. Trueman,	44	Tending v. London,	372
Stevens v. Adamson,	250	Thomas v. Blackman,	77, 322
——— v. Benning,	53	——— v. Dering,	113, 140, 141, 160
——— v. Guppy,	364	Thompson v. Blackstone,	114
Stewart v. Alliston,	2, 93, 343, 352	——— v. Guyon,	283, 285
——— v. Denton,	180	Thomson v. Thomson,	146
——— v. Smith,	319	Thornbury v. Bevill,	18, 76, 80
Stilwell v. Wilkins,	128, 129	Thornett v. Haines,	209, 210
Stocken v. Collin,	82	Thurnell v. Balburnie,	96
Stocker v. Brocklebank,	23	Thynne v. Glengall (Lord),	179
——— v. Dean,	53	Tibbut v. Potter,	413
——— v. Wedderburn,	19, 134, 240, 246	Tilly v. Peers,	129
Stockley v. Stockley,	181, 224	Tindal v. Cobham,	391, 393
Stockton and Hartlepool Railway Company v. Leeds and Thirsk Railway Company,	332	Todd v. Gee,	345, 395
Stokes v. Moore,	162	Toller v. Carteret,	25
Stone v. Commercial Railway Com- pany,	9	Tomkinson v. Staight,	175, 190
Storer v. Great Western Railway Company,	21, 22, 120	Toole v. Medicott,	181, 190
Storry v. Walsh,	384	Tourle v. Rand,	60
Stourton (Lord) v. Meers,	371	Townley v. Bond,	362
Stowell v. Robinson,	312	Townsend v. Champernowne,	48
		Townshend (Marquis) v. Stan- groom,	213, 223, 226, 232
		Trant v. Dwyer,	285, 405
		Trefusis v. Clinton (Lord),	389
		Tritton v. Foote,	402, 403
		Trower v. Newcome,	197
		Tulk v. Moxhay,	59
		Turner v. Harvey,	115, 208
		——— v. Wright,	336
		Twigg v. Fifield,	264
		Twining v. Morrice,	106, 111

Underhill v. Harwood,	130	Wethered v. Wethered,	399
Underwood v. Hitheox,	90	Whaley v. Bagnal,	186
Van v. Corpe,	202, 220, 395	Wheatley v. Slade,	141
Vancouver v. Bliss,	254, 371	Wheeler v. D'Esterre,	98
Vandenanker v. Desborough,	51	—— v. Horne,	385
Vansittart v. Vansittart,	72, 241, 410	—— v. Trotter,	18
Vauxhall Bridge Company v. Spencer, (Earl),	63	Wheelton v. Hardisty,	194, 196
Vernon v. Keys,	208	Whitbread, Ex parte,	158
—— v. Vernon,	44	—— v. Brockhurst,	157, 177
Vesey v. Elwood,	264	Whitchurch v. Bevis,	157, 169, 173
Vigors v. Pike,	200	White v. Cuddon,	114, 141, 353
Vouillon v. States,	223	—— v. Damon,	130
Wakeman v. Rutland (Countess of),	47	—— v. Proctor,	164
Walker v. Barnes,	291	Whittaker v. Howe,	18, 245, 333
—— v. Bartlett,	13	Wickham v. Evered,	391, 393
—— v. Eastern Counties Railway Company,	9, 11, 79, 92	Wigley v. Blackwal,	297
—— v. Jeffreys,	283, 285, 315	Wilbraham v. Livesey,	360
—— v. Walker,	172, 231	Wilde v. Fort,	312
Wall v. Stubbs,	55, 193, 197	—— v. Gibson,	191, 195, 207, 210
Waller v. Hendon,	164	Wilkes v. Wilkes,	410
Wallis v. Day,	22	Wilkinson v. Torkington,	268
—— v. Sarel,	389, 390	Wilks v. Davis,	96
—— v. Woodyear,	365	Willan v. Willan,	106, 402
Walpole (Lord) v. Orford (Lord),	60, 85, 90, 179	Wilcox v. Bellaers,	254, 373
Walters v. Northern Coal Mining Company,	268	Willets v. Bushby,	39
—— v. Upton,	391	Williams, Ex parte,	41
Wankford v. Fotherley,	87	—— v. Edwards,	354, 395
Warden v. Jones,	173, 184, 185	—— v. St. George's Harbour Company,	63, 65
Wardle v. Carter,	125	—— v. Shaw,	311
Ware v. Grand Junction Water-works Company,	331	—— v. Steward,	5
Waring v. Manchester, Sheffield, and Lincolnshire Railway Company,	240, 243	—— v. Williams, 79, 321, 330, 331,	407
Warner v. White,	297	Williamson v. Woottton,	105
—— v. Willington,	76, 77, 80, 81, 94,	Willingham v. Joyce,	280, 281
	168	Wills v. Stradling,	176, 181, 183, 184
Warren v. Richardson,	367	Wilmot v. Wilkinson,	274, 359
Watson v. Hemsworth Hospital,	404	Wilson v. Bellairs,	373
—— v. Marston,	123	—— v. Clapham,	378, 385
—— v. Reid,	322, 324	—— v. Fuller,	193
Watt v. Evans,	182, 183	—— v. Kearse,	133
Weatherall v. Geering,	55, 280	—— v. Short,	56, 201
Webb v. Clarke,	30	—— v. Williams, 138, 344, 345, 351,	353
—— v. Direct London and Ports-mouth Railway Company,	6, 104,	—— v. Wilson,	24, 335, 410, 411
	116, 120, 287	Winch v. Winchester,	228
—— v. Kirby,	394	Winnington v. Briscoe,	143, 269
Webster v. Dillon,	246	Winter v. Blades,	380
—— v. Webster,	185	Wiseman v. Roper,	397
Weddall v. Nixon,	260, 389	Withy v. Cottle,	8, 12, 315, 368, 369
Wedgwood v. Adams,	122	Wood v. Abrey,	125
Welford v. Beazely,	162, 168	—— v. Bernal,	325, 351
Wellesley v. Wellesley,	411	—— v. Griffith,	56, 117, 145, 414, 415, 416
Wentworth v. Cock,	50	—— v. Machu,	368, 369
Western v. Russell,	137, 138, 161, 168	—— v. Midgley,	156, 159, 169, 173
Westmeath (Lord) v. Westmeath (Countess of),	411	—— v. Richardson,	113

XXX FRY ON SPECIFIC PERFORMANCE OF CONTRACTS.

Worthington v. Warrington,	99	Wynne v. Griffith,	375
Wright v. Bell,	4	— v. Price,	13
— v. Bigg,	82	Wythes v. Lee,	141, 395
— v. Bond,	368	Wyvill v. Exeter (Bishop of),	264
— v. Howard,	315		
— v. Wright,	398	Young v. Clarke,	127
Wrigley v. Sykes,	256	Younge v. Duncombe,	391
Wynn v. Morgan,	371	Yovatt v. Winyard,	407

THE SPECIFIC PERFORMANCE OF CONTRACTS.

PART I. OF THE JURISDICTION.

CHAPTER I.

OF THE CONTRACTS IN GENERAL WHICH ARE SUBJECTS OF THE JURISDICTION.

§ 1. THE specific performance of contracts is an ancient branch of the equitable jurisdiction of the Court of Chancery,(a) arising out of the incapacity of the courts of common law to enforce the actual performance of the contract: for these courts, though recognizing the obligation of the parties to a contract to perform their respective parts, enforce this obligation, not specifically, but only by way of damages. The maxim of the civil law, *Nemo potest praecise cogi ad factum*,(b) is equally the principle of the common law of England. The grounds on which this jurisdiction is founded, and the consequent extent of it, will be best stated by a consideration of the contracts in respect of which equity will thus interfere.

§ 2. There are many cases in which, though a contract is in conscience obligatory upon both the parties to it, yet *the common law, from the strictness of its forms, affords no remedy to the party injured [*_2] by the non-performance of the other. The defect of justice which would hence arise is avoided by the jurisdiction of equity, which in such cases compels the specific execution of the contract, if in other respects fit for the intervention of the court.

(a) The Court of Bankruptcy has not jurisdiction in specific performance. Ex parte Cutts, 3 Deac. 242, overruling Ex parte Sidebotham, 1 Mon. & Ayr. 655, Ex parte Barrington, 2 Mon. & Ayr. 245.

(b) See Pothier, Tr. des Oblig. Part I, chap. ii. art. 2, § 2.

§ 3. At law, exact performance by the plaintiff of his part of the contract according to its very terms, must be averred and proved; whereas, in equity, a distinction is made between those terms which are of the essence of the contract and those terms which are not thus essential, and a breach of which it is inequitable for either party to set up against the other as a reason for refusing to execute the agreement between them. In these cases the doctrine of common law is forfeiture, the doctrine of equity is compensation. "Lord Thurlow," to quote the language of his successor Lord Eldon,(c) "used to refer this doctrine of specific performance to this;—that it is scarcely possible that there may not be some small mistake or inaccuracy; as, that a leasehold interest represented to be for twenty-one years, may be for twenty years and nine months; some of those little circumstances that would defeat an action at law, and yet lie so clearly in compensation that they ought not to prevent the execution of the contract." On this ground the jurisdiction rests in all cases where specific performance is decreed with compensation.

§ 4. The fact that the legal remedy has been lost by the default of the very party seeking the specific performance will not exclude the jurisdiction, if it be notwithstanding conscientious that the agreement should be performed; as in cases where the plaintiff has performed his part substantially, but not with such exactitude as to be able to plead performance at law.(d)

[*3] *§ 5. But besides these cases, there are many others in which the court interferes, because there is no remedy at law, by reason of something in the subject-matter of the contract, or the parties to it, or the form in which it is concluded.

§ 6. Thus it will give relief in respect of an agreement to assign a chose in action,(e) or of an agreement respecting the hope of succession of an heir,(f) although no damages could be recovered at law for contracts dealing with these subject-matters.

§ 7. And so again, though no action would lie in respect of a contract to convey by a particular day, which was rendered impossible by the death of the contractor before that day, yet specific performance would be decreed against the heir.(g) And the court has interfered specifically to execute an agreement evidenced by a bond given to a wife by her husband, or to a husband by his wife,(h) before marriage, though the bond was suspended at law by the intermarriage.

§ 8. The same principle equally applies to give the court jurisdiction where, though the contract is in its nature such that a breach of it can be satisfied by damages, yet from some particular circumstances this remedy is not open to the aggrieved party; therefore, where a contract for the purchase of timber-trees was comprised in a memorandum which

(c) In *Mortlock v. Buller*, 10 Ves. 305, 306. See also *Stewart v. Alliston*, 1 Mer. 26, 32.

(d) *Davis v. Hone*, 2 Sch. & Lef. 341, 347. (e) 1 Mad. Ch. 362.

(f) *Jones v. Roe*, 3 T. R. 88, compared with *Beckley v. Newland*, 2 P. Wms. 182, and cases infra, § 940, et seq. See also 1 Fonbl. Eq. 216.

(g) See Arguments of Counsel in *Milnes v. Gery*, 14 Ves. 403; 1 Mad. Ch. 362.

(h) *Cannel v. Buckle*, 2 P. Wms. 242; *Acton v. Acton*, Prec. Ch. 237. See *Gage v. Acton*, 1 Salk. 325.

appeared not to be the final contract, but was to be made complete by subsequent articles, so that it was doubtful whether the agreement, as it then stood, would not have been considered at law as incomplete, and so the plaintiff have been debarred of any remedy there, Lord Hardwicke *held that the contract was one which the court could specifically perform.⁽ⁱ⁾ In another case a contract to purchase a debt was [*4] enforced against the purchaser, on the ground that the debt had not been so assigned to him as to enable him successfully to sue at law;^(k) and in the case of a contract for the purchase of government stock, the fact that the plaintiff was not the original holder of the scrip, but merely the bearer, which rendered it doubtful whether he could maintain an action at law upon the contract, was one ground on which the court was held to have jurisdiction.^(l)

§ 9. It is said that before the time of Lord Somers the practice was to send the parties to law, and to entertain the suit only in case of the plaintiff's there recovering damages,^(m) a practice which, of course, involved the proposition that specific performance could not be granted except in cases where damages could be recovered at law. The case in which this principle was the most distinctly maintained, was that of Dr. Bettsworth v. The Dean and Chapter of St. Paul's,⁽ⁿ⁾ decided by Lord King in 1726, with the assistance of Lord C. J. Raymond and Mr. Justice Price. A lease had been granted by the defendants previously to the disabling statute of 13 Eliz., with the covenant to renew for ninety-nine years, and the plaintiff sought a renewal for the term allowed by the statute, which the lord chancellor refused, on the ground that no action could have been maintained on the covenant after the passing of the statute. "I take this to be a certain clear rule of equity," said Lord Raymond,^(o) "that a specific performance shall never be compelled for the not doing of which the law would not give damages. The covenant to oblige *them to make a lease for ninety-nine years is gone, and damages cannot be [*5] recovered for part of a covenant, and therefore am of opinion equity cannot interfere." This decision, which was opposed by the opinion of Sir Joseph Jekyll, was reversed in the house of lords; and it is abundantly evident, from the cases already cited, that the jurisdiction at present exercised is not restrained within these limits, and that there are many cases in which specific performance is granted where no action for damages could be maintained.^(p)

§ 10. As the courts of equity interfere where the legal remedy is entirely wanting, so they assume jurisdiction also where this remedy, though not entirely wanting, is yet inadequate to the full demands of justice.

§ 11. The only remedy in courts of law for the non-performance of a

(i) Buxton v. Lister, 3 Atk. 383, but see infra, §§ 203, 342.

(k) Wright v. Bell, 5 Pri. 325. (l) Doloret v. Rothschild, 1 S. & S. 590.

(m) Per Sir T. Clarke in Doddsley v. Kinnersley, Ambl. 406.

(n) Sel. Cas. in Ch. 66. (o) p. 69.

(p) Per Lord Redesdale in Lennon v. Napper, 2 Sch. & Lee. 682; Cannel v. Buckle, 2 P. Wms. 242. The passage in Williams v. Steward, 3 Mer. 491, to which Mr. Justice Story (Eq. Jur. § 741,) has referred as a dictum of Sir Wm. Grant, is the language of counsel arguendo.

contract is in damages, that is to say, in the payment of a sum of money by the party who has broken the contract to the party injured by that breach. If money were in all cases a measure of the injury done by this breach, it is evident that an exact equivalent for the wrong might be made, and that the justice done would be complete. But money is, it seems, an exact equivalent, only when by money the loss sustained by the breach of contract can be fully restored. Now, in a vast variety of cases, this is not so; for though one sovereign or one shilling is to all intents and purposes as good as any other sovereign or shilling, yet one landed estate, though of precisely the same market value as another, may be vastly different in every other circumstance that makes it an object of desire; so that it evidently follows that there would be a failure of justice, unless some other jurisdiction supplemented that of common law, by compelling the *defaulting party to do that which in conscience he is bound to do, namely, actually and specifically to perform his agreement. The common law treats as universal a proposition which is for the most part, but not universally, true, namely, that money is a measure of every loss.(q) The defect of justice which arises from this universality of the legal principle is met and remedied by the jurisdiction of courts of equity to compel specific performance.

§ 12. The ground of this jurisdiction being the inadequacy of the remedy at law, it follows that where that remedy is adequate, chancery will not interfere to compel specific performance. It is on this ground that the court refuses generally to entertain suits in respect of government stock or chattels, as will be hereafter seen; and in all cases where the contract is satisfied by a mere payment of money.(r)

§ 13. The principle has been recently recognized in several other cases. It was one of the grounds on which the lords justices acted in dismissing the bill in Lord James Stuart v. London and North-western Railway Company,(s) as far as regards specific performance, and only putting the defendants on terms to make certain admissions in any action at law to be brought by the plaintiff against them,—their lordships considering that, the railway having been abandoned and complete relief being in their opinion obtainable at law, the case was not one for specific performance. It was also one of the reasons alleged for dismissing the bill by Lord Cranworth in Webb v. Direct London and Portsmouth Railway Company,(t) he considering that under the circumstances the vendor could obtain complete relief at law. The authority of these decisions has been subsequently questioned by Lord St. Leonard's(u) but

[*7] *as to the applicability of the principle to the circumstances, and not as to the validity of the principle itself.

§ 14. In one case,(v) specific performance was sought of an agreement for a tenancy from year to year, the agreement specifying that the tenant

(q) See Aris. Eth. Nic. lib. ix. c. 1.

(r) See the cases on contracts with a penalty, infra, § 66, et seq.

(s) 1 De G. M. & G. 721.

(t) 1 De G. M. & G. 521.

(u) Hawkes v. Eastern Counties Railway Company, 1 De G. M. & G. 737; S. C. 5 Ho. Lords, 331.

(v) Clayton v. Illingworth, 10 Ha. 451.

was in all respects to abide by the terms entered into by a previous tenant, and that the tenant should pay for an agreement to be drawn up; it was contended that the court would therefore interfere for the purpose of settling the proper terms of the agreement. But the court thought the remedy at law was adequate, and that the full terms of the agreement might be shown there, and therefore refused to decree performance.

§ 15. On this ground also, as well as that of the incapacity of the court to carry out the works, the courts refused specifically to perform a contract to make a branch railway, although the agreement for the execution of it had been entered into during the pendency of the bill before parliament, and when several of the directors had thoughts of withdrawing the bill, and would have in fact done so, as the bill alleged, but for the agreement in question.(w)

§ 16. And where a bill sought the specific performance of an agreement which would have been effected by a mere account of profits and a payment of the amount found due, and there was no obstacle to the recovery of the amount at law, the court dismissed it.(x)

§ 17. In analogy with this principle, in a recent case(y) in which the plaintiffs sought the specific performance of an agreement to grant a way-leave for a railway for a *term of sixty years, and between the filing of the bill and the hearing, the plaintiffs had obtained statutory powers to take the land in fee, the Vice-Chancellor Sir John Stuart considered this to be a circumstance strongly influencing the discretion of the court against specific performance.

§ 18. But where the parties to an agreement might have compensation in damages, equivalent in value to what the court can give by its decree, but a court of law, not being able to modify its judgment, would be unable to preserve the benefit of the agreement to all parties, then equity has jurisdiction specifically to perform the agreement. So where A. gave a note to B., and C. agreed with B. for the relinquishment of his (B.'s) claim against A. on the payment of certain sums, for which the notes were, in the contemplation of equity, to stand only as a security, it was held that the court would specifically perform the agreement, though the relations between the parties might have been worked out by actions at law.(z)

§ 19. Sir John Leach seems to have considered that the fact that the remedy in damages given at law depends for its beneficial effect upon the personal responsibility of the party, gave the other party to the contract a right to sue in equity for its actual performance.(a) It is evident that this principle applies to all damages, and, if it were admitted, would give the court jurisdiction in all cases of contract, whether for the sale of chattels or of any other nature, which certainly is not the law of the

(w) *South Wales Railway Company v. Wythes*, 1 K. & J. 186; S. C. 5 De G. M. & G. 880.

(x) *Ord v. Johnston*, 1 Jur. N. S. 1063, (Stuart V. C.) See also *Sturge v. Midland Railway Company*, Week. Rep. 1857-1858, 233.

(y) *Meynell v. Surtees*, 3 Sm. & Gif. 101. See also per Lord Cranworth in *Morgan v. Milman*, 3 De G. M. & G. 35.

(z) *Beech v. Ford*, 7 Ha. 208. Affirmed by L. C.

(a) *Doloret v. Rothschild*, 1 S. & S. 590.

court. Indeed, that learned judge seems to have shown a tendency to extend the jurisdiction in specific performance somewhat more liberally than other equity judges.(b)

[*9] *§ 20. A question as to the adequacy of the legal remedy has arisen in respect of the compulsory powers of railway or other public companies, to take lands required for the purposes of their undertakings. It has been decided that a species of contract is constituted by a notice served on a landowner by such a company,(c) acceptance here being unnecessary, inasmuch as the vendor has no power to refuse ;(d) and that by this notice the company and the landowner are placed in the relation of vendor and purchaser, binding both parties, and taking the subsequent proceedings for the enforcement of the contract thus constituted, out of the limitation of time for the exercise of the compulsory powers of the company.(e)

* 21. With regard to the interference of the court in respect of such contracts, and the adequacy or inadequacy of the statutory remedies, a distinction must be taken. In those cases in which the contract depends entirely on the statutory powers of the company, and there are statutory methods prescribed by the Lands Clauses Consolidation Act for working out the rights of the parties, a court of equity will not, it seems, interfere : so that in one case,(f) Lord Cottenham, overruling a decision of Vice-Chancellor Wigram, allowed a demurrer to a bill to compel the company who were in possession of the land to summon a jury, his lordship holding [*10] that the notice *per se* did not give the *court jurisdiction, and that the rights of the parties were to be regulated by the statute.

§ 22. But when the contract is no longer an incipient one under the statutory provisions, but the company has bound itself by a contract, valid under the Statute of Frauds, then its completion may be compelled by either party in an ordinary suit; and that, notwithstanding that the circumstances which led the company into the contract may have arisen out of the act of parliament, or that the written contract is in part found in documents which were originally intended to be ancillary to the enforcing of the contract under the act of parliament.(g)

§ 23. It might appear at first sight that inasmuch as money in exchange

(b) See *Withy v. Cottle*, 1 S. & S. 594; *Kenney v. Wexham*, 6 Mad. 355. Cf. *Brealey v. Collins*, You. 317, 330.

(c) *Rex v. Hungerford Market Company*, 4 B. & Ad. 327; *Walker v. Eastern Counties Railway Company*, 6 Ha. 594; *Doo v. London and Croydon Railway Company*, 1 Rail. C. 257.

(d) Per Lord Cottenham in *Stone v. Commercial Railway Company*, 4 My. & Cr. 124.

(e) *Reg. v. Birmingham and Oxford Junction Railway Company*, 15 Q. B. 634; affirmed in *Cam. Sac.* overruling *Brocklebank v. Whitehaven Junction Railway Company*, 15 Sim. 632, S. C. 5 Rail. C. 373; *Marquis of Salisbury v. Great Northern Railway Company*, 17 Q. B. 840.

(f) *Adams v. Blackwall Railway Company*, 2 M'N. & G. 118, per Knight Bruce L. J. in *Morgan v. Milman*, 3 De G. M. & G. 36; *Leominster Canal Co. v. Shrewsbury and Hereford Railway Company*, 3 Jur. N. S. 930, (Wood V. C.); S. C. 3 K. & J. 654.

(g) *Inge v. Birmingham, Wolverhampton and Stour Valley Railway Company*, 3 De G. M. & G. 658, affirming S. C. 1 Sm. & G. 347; *Regent's Canal Company v. Ware*, 23 Beav. 575. See also *Douglass v. London and North-western Railway Company*, 3 K. & J. 173.

for the estate is what the vendor of land is entitled to, he has a complete remedy at law, and therefore could not sustain a bill for the specific performance of the contract. But, on further consideration, it will be apparent that damages will not place the vendor in the same situation as if the contract had been performed; for then he would have got rid of the land and of all the liabilities attaching to it, and would have the net purchase-money in his pocket; whereas, after an action at law, he still has the land and, in addition, damages,—representing, in the opinion of a jury, the difference between the stipulated price and the price which it would probably fetch, if re-sold, together with incidental expenses and any special damage which he may have suffered.(h) The doctrine of equity, of the conversion of the land into money, and of the money into land upon the execution of the contract(i)—and the lien which the vendor has on the estate for the *purchase-money, and his right to enforce [*11] this in equity, are additional reasons for extending the remedy to both parties. Accordingly, it is well established that the remedy is mutual, and that the vendor may maintain his bill in all cases where the purchaser could sue for specific performance of the agreement, and this independently of any question on the Statute of Frauds.(k)

§ 24. On the principle that damages are a sufficient satisfaction, it is now perfectly settled that specific performance will not be enforced of an agreement for the transfer of stock.

§ 25. It appears that in one instance Lord Hardwicke did grant specific performance of such an agreement :(l) but in the earlier case of Cud v. Rutter,(m) Lord Macclesfield, overruling a decision at the rolls, refused to perform an agreement to transfer South Sea stock, though by the decree he undertook to arrange the settlement between the parties. His lordship assigned three reasons for this decision: first, the nature of the subject-matter of the contract; secondly, the circumstance that the defendant was not possessed of the stock at the time of the contract; and thirdly, that the liability to sudden rise and fall in stock made the day a most material part of the contract, and therefore rendered it improper for the court to carry into execution. This principle was adopted by C. B. Gilbert,(n) and stated to be the settled doctrine of the court by Lord Eldon.(o)

§ 26. In a case(p) before Sir John Leach a bill for the specific performance of an agreement to sell Neapolitan stock was supported; but this was partly on the ground of its praying the delivery of the certificates which would *constitute the plaintiff the proprietor of a certain [*12] quantity of the stock, and partly because, the plaintiff not being the original scrip-holder, but merely the bearer, it was doubtful whether

(h) Eastern Counties Railway Company v. Hawkes, 5 Ho. Lords, 331, 359, 376; Lewis v. Lord Lechmere, 10 Mod. 503.

(i) Ibid.

(k) Clifford v. Turrell, 1 Y. and C. C. 138, 150; Walker v. Eastern Counties Railway Company, 6 Ha. 594; Kenney v. Wexham, 6 Mad. 355.

(l) See Nutbrown v. Thornton, 10 Ves. 161.

(m) 5 Vin. Abr. 538, pl. 21; S. C. 1 P. Wms. 570.

(n) Cappur v. Harris, Bunn. 135. (o) In Nutbrown v. Thornton, 10 Ves. 161.

(p) Doloret v. Rothschild, 1 S. & S. 590.

he would be able to maintain his action at law. In another case,(q) the same judge overruled a demurrer to a bill by the vendor of a life annuity payable out of dividends of stock, on the ground that the purchaser could clearly maintain such a bill, and that the remedy must be mutual. But it seems that the court would not enforce specific performance of an agreement to sell a life interest in funds.(r)

§ 27. With regard to railway shares and investments of that description the same principle does not apply. "In my opinion," said the late vice-chancellor of England,(s) "there is not any sort of analogy between a quantity of £3 per cents. or any other stock of that description (which is always to be had by any person who chooses to apply for it in the market,) and a certain number of railway shares of a particular description, which railway shares are limited in number, and which, as has been observed, are not always to be had in the market;" and accordingly specific performance was enforced of a contract to sell a certain number of railway shares, the shares not being particularized. It may have been on this principle that Lord King disallowed a demurrer to a bill for the transfer of York Building Stock ;(t) but a different view seems to have been previously entertained by Lord Macclesfield, inasmuch as he dismissed a bill for the transfer of £1000 of the same stock.(u)

§ 28. A vendor of railway shares may maintain a suit against the purchaser to compel him to complete the purchase by the execution and [*13] registration of a proper *transfer,(v) and to indemnify the vendor against future calls.(w)

§ 29. The court for the most part refuses to interfere in respect of chattels, both because damages are a sufficient remedy, and because the price of such articles, especially of merchandise, varies so as often to render the specific execution of contracts for their sale and delivery an act of injustice, entailing perhaps ruin on one side, when upon an action that party might not have paid perhaps above a shilling damages.(x) As these principles however do not apply to all cases of chattels, exceptions arise which we shall now consider.

§ 30. When the chattel in question is unique,—when there is, over and above the market value, that which has been called the *preium affectionis*, the court has interfered, and not left the party to his legal remedy. The leading case in this branch of the law is Pusey v. Pusey,(y) in which the heir of the family of Pusey recovered possession by a bill in equity of the celebrated Pusey horn : the grounds of the decision are

(q) Withy v. Cottle, 1 S. & S. 174.

(r) Brealey v. Collins, You. 317, 330.

(s) Duncuft v. Albrecht, 12 Sim. 189, 199. See Jackson v. Cocker, 4 Beav. 59.

(t) Colt v. Nettervill, 2 Sim. 304.

(u) Dorison v. Westbrook, 5 Vin. Abr. 540, pl. 22.

(v) Shaw v. Fisher, 2 De G. & Sm. 11; 5 De G. M. & G. 596.

(w) Wynne v. Price, 3 De G. & Sm. 310; Walker v. Bartlett, 18 C. B. 845.

(x) Per Lord Hardwicke in Buxton v. Lister, 3 Atky. 384. In Norton v. Serle, Finch, 149, Lord Nottingham specifically performed a charter-party by directing the payments to be made in pursuance of it. See also Claringbould v. Curtis, 21 L. J. Ch. 541. Where the delivery of chattels is only part of a contract otherwise unenforceable, the contract may be performed. Marsh v. Milligan, 3 Jur. N. S. 979, (Wood V. C.)

(y) 1 Vern. 273.

insufficiently reported, but the case "turned," to quote Lord Eldon's language in respect of it,(z) upon the *preium affectionis*, independent of the circumstance as to tenure, which could not be estimated in damages." This has been followed by other similar cases, one having relation to an ancient silver altarpiece, remarkable for a Greek inscription and dedication to Hercules,(a) another to a tobacco-box of a remarkable and *peculiar kind,(b) and another to masonic dresses and ornaments.(c)

§ 31. Most of these cases were rather in the nature of proceedings arising from tort than contract, but there seems no doubt that the principle of the exception would be equally applicable in both cases.

§ 32. The Common Law Procedure Act, 1854, having, by the 78th section, given to the courts of common law power in actions of detinue to order that execution shall issue for the return of the chattel detained, without giving the defendant the option of retaining such chattel upon paying the value assessed, the necessity of resorting to a court of equity in these cases appears to have ceased, though the jurisdiction no doubt remains intact.

§ 33. Closely allied with the instances of unique chattels are those cases which seem to establish that contracts for the delivery of chattels may be enforced, when the defendant can supply them in such a way as is essential to the proceedings of the plaintiff, and no one else can: as if a man were to contract with a shipbuilder for the supply of timber, the shipbuilder being under contract to complete a ship by a given time, for which the supply of the timber by the defendant was essential. But this will not be extended to mere questions of convenience, as the supply of coal from an adjoining colliery, when plenty of other coal can be procured in the neighbourhood.(d)

§ 34. Cases might probably arise in which the court would interfere in respect of chattels connected with the enjoyment of an estate, where but for such connection it *would not exercise jurisdiction. In one case(e) Lord Eldon made an order specifically to restore to a tenant the stock on a farm, which had been seized by the landlord under a distress and bill of sale; his lordship holding that under the circumstances of that case, there was an entire contract by which the landlord agreed to let the tenant have both the estate and the chattels, the enjoyment of the chattels being requisite for the enjoyment of the estate.

§ 35. This appears to have been one ground on which the court anciently enforced agreements to build in certain cases: as, where the father entered into articles with a builder, and died before the execution

(z) In Nutbrown v. Thornton, 10 Ves. 163.

(a) Duke of Somerset v. Cookson, 3 P. Wms. 390.

(b) Fells v. Read, 3 Ves. 70.

(c) Lloyd v. Loaring, 6 Ves. 773. See also Savill v. Tancred, 1 Ves. Sen. 101, S. C. 3 Sw. 141 n. Lady Arundell v. Phipps, 10 Ves. 139. Lowther v. Lord Lowther, 13 Ves. 95. Is a ship within this principle? see Lynn v. Chaters, 2 Ke. 521.

(d) Per Lord Hardwicke in Buxton v. Lister, 3 Atk. 383, compared with Pollard v. Clayton, 1 K. & J. 462.

(e) Nutbrown v. Thornton, 10 Ves. 159.

of the contract, the heir was allowed to sue the personal representative of his father and the builder, the contract savouring of the realty.(f) So, in another case, an agreement to build was specifically enforced against a tenant who, having undertaken to rebuild the farm-house, had done so on his own soil instead of his landlord's.(g)

§ 36. From the specific performance in respect of chattels must be discriminated the cases where a trust has been constituted in respect of personal chattels: for the nature of the subject-matter is no obstacle to the interference of the court to compel execution of the trust, whether it be one constituted by direct declaration, or a constructive trust arising from the act of the parties.(h) The court will accordingly restrain improper dealings by an agent with chattels, though they may be of no peculiar or intrinsic value.(i)

§ 37. It has been laid down that where the contract, though personal, is executory, specific performance will be decreed when the damages at law cannot accurately represent *the value of the contract to either [*16] party.(k) The cases we have lately considered may be regarded as particular instances of this general rule. But it has been carried into effect in some other ways. Thus, where the contract was for the sale of debts proved under two commissions of bankrupt, Sir John Leach granted specific performance, considering that to compel the plaintiff to accept damages would be to compel him to sell these dividends, which were of unascertained value, at a conjectural price.(l)

§ 38. In one case, cited by Lord Hardwicke, articles for the sale of eight hundred tons of iron, to be paid for by instalments, at periods running through some years, were specifically enforced.(m) The case appears to have been approved by his lordship, but has recently been doubted by Vice-Chancellor Wood, who remarked on the absence of any case for the sale of mere goods being supported on the ground of their being to be delivered by instalments.(n)

§ 39. When the contract is from its nature such that the court cannot enforce its performance, it is necessarily no subject of its jurisdiction in that respect.

§ 40. On this principle the court will not prohibit the making of a secret medicine; for if it be secret, then the court cannot tell whether it has been infringed or not,(o) nor will it for the same reason direct the specific performance of covenants in a farming lease, for "how," said Lord Northington, "can a master judge of repairs in husbandry?"(p)

§ 41. And so too the court will not interfere to enforce a covenant by

(f) Holt v. Holt, 2 Vern. 322, per Lord Hardwicke in Rook v. Warth, 1 Ves. Sen. 461.

(g) Pembroke v. Thorpe, 3 Sw. 437 n.

(h) Wood v. Rowcliffe, 3 Ha. 304; S. C. 2 Phil. 382; Pooley v. Bubb, 14 Beav. 34.

(i) Wood v. Rowcliffe, ubi supra. (k) Adderley v. Dixon, 1 S. & S. 607.

(l) S. C. See also per Wood, V. C., in Pollard v. Clayton, 1 K. & J. 462.

(m) Taylor v. Neville, cited 3 Atky. 384.

(n) Pollard v. Clayton, 1 K. & J. 462.

(o) Newberry v. James, 2 Mer. 446; Williams v. Williams, 3 Mer. 157.

(p) Rayner v. Stone, 2 Ed. 128.

means of injunction, where the acts complained* of as breaches [*17] are frequent, and the court could not ascertain whether there has in each case been a breach without an action at law; as of a covenant not to sell water from a certain well to the plaintiff's injury.(q)

§ 42. The incapacity of the court to execute the contract limits its jurisdiction in cases of agreement for the sale of the goodwill of a business. For where the contract has respect to a goodwill alone, unconnected with business premises the court refuses specific performance, by reason of the uncertainty of the subject-matter, and the consequent incapacity of the court to give specific directions as to what is to be done to transfer it.(r) But where the goodwill is entirely or mainly annexed to the premises, and the contract is for the sale of the premises and goodwill, the contract may be enforced.(s) For in that case the goodwill is merely the advantage attached to the possession of the house or other place of business,(t)—“the probability,” to use the words of Lord Eldon,(u) “that the old customers will resort to the old place,”—together with the right which arises to the purchaser to restrain the vendor from setting up anew, or continuing the identical trade he has contracted to sell,—but without any right, independently of stipulation, to prevent the vendor's setting up a similar business.(v) In the case of agreements for the sale of a business of an attorney, the legality of stipulations comprised in them, for the purpose of giving to the party to carry on the business the advantage of the name *or of the recommendation of the party [*18] not engaged in it, has been questioned by the highest authorities, including Lord Eldon, Sir William Grant, and Lord Justice Knight Bruce.(w) But it seems to be now established, not only that such transactions are valid at law,(x) but that they may be specifically executed by injunction or otherwise, by courts of equity.(y)

§ 43. The court will not enforce a contract which is in its nature revocable; for its interference in such a case would be idle, inasmuch as what it had done might be instantly undone by either of the parties.

§ 44. Thus where the registrar of a consistory court agreed to grant a deputation of his office, it was held that such a deputation was in its nature revocable, and therefore could not be enforced by the court.(z)

§ 45. It is on the same principle that the court generally refuses to

(q) *Collins v. Plumb*, 16 Ves. 454. See also *City of London v. Nash*, 3 Atk. 512, 515.

(r) *Baxter v. Conolly*, 1 J. & W. 576; *Bozon v. Farlow*, 1 Mer. 459. *Coslake v. Till*, 1 Russ. 376.

(s) *Darbey v. Whittaker*, 4 Drew. 134, 139, 140.

(t) *Chissum v. Dewes*, 5 Russ. 29; *Mummery v. Paul*, 1 C. B. 316, 326; and see further, as to the nature of a good-will, *Potter v. Commissioners of Revenue*, 10 Exch. 147; *Allison v. Monkwearmouth*, 4 Ell. & Bl. 13.

(u) *In Crutwell v. Lye*, 17 Ves. 346.

(v) *Crutwell v. Lye*, 17 Ves. 335; *Shackell v. Baker*, 14 Ves. 468.

(w) Per Lord Eldon in *Candler v. Carden*, Jac. 231; *Bozon v. Farlow*, 1 Mer. 459; *Thornbury v. Bevill*, 1 Y. & C. C. 584. See *Gilfillan v. Henderson*, 2 Cl. & Fin. 1.

(x) *Bunn v. Guy*, 4 East, 190.

(y) *Whittaker v. Howe*, 3 Beav. 383; *Aubin v. Holt*, 2 K. & J. 66.

(z) *Wheeler v. Trotter*, 3 Sw. 174 n. See also *Sturge v. Midland Railway Company*, Week. Rep. 1857-1858, 233, (Stuart V. C.)

interfere in cases of agreements to enter into partnership, which do not specify the duration of the partnership,—that relation, unless otherwise provided, being dissolvable at the will of either party.(a) There is indeed some authority to the contrary of this proposition, consisting of a dictum of Lord Hardwicke's(b) in general terms, and two or three cases(c) in which specific performance of such agreements seems to have been enforced, but with regard to which it does not appear whether the partnerships thus constituted were for a term or not; and it is indeed said that Lord Eldon was not quite satisfied with his decision in the case quoted as establishing the principle.(d)

[*19] *§ 46. The doctrine, however, appears to be generally accepted as that of the court. Thus in a recent case(e) before the master of the rolls, the principle was acted on: the defendant entered into an agreement with the plaintiff company, to take a certain number of shares and to execute the deed of settlement when required; and of this agreement the court refused specific performance, because the defendant might, by the rules of the company, have ceased again to be a partner within fourteen days after becoming such.

§ 47. It is on the same reasoning that the court declines to perform an agreement, if such covenants must be introduced into the instrument to be executed that the party resisting the performance may immediately take advantage of them to deprive the other of all benefit under the instrument; as, for instance, an agreement for a lease which is to contain a proviso for re-entry on breach of a covenant, which the plaintiff had already broken.(f)

§ 48. In some old cases the court entertained suits in respect of building contracts: and what has been considered the earliest trace of the jurisdiction in specific performance is a dictum of Justice Genney in the 8 Edward IV., that a promise to build a house would be specifically enforced.(g) Lord Hardwicke also maintained this view of the jurisdiction of the court.(h) But it is now clearly settled that, subject to certain exceptions, the court will not interfere in cases of contracts to build or repair,(i) both because specific performance is "decreed(k) only where the party wants *the thing in specie and cannot have it any other way," and because such contracts are for the most part too uncertain to enable the court to carry them out.(l)

[*20] § 49. For the first of the reasons stated, Sir William Grant refused specific performance of a covenant to make good a gravel-pit.(m)

(a) *Hercy v. Birch*, 9 Ves. 357.

(b) *In Buxton v. Lister*, 3 Atky. 385.

(c) *Anon.* 2 Ves. Sen. 629; *Anon.* 1 Mad. Ch. 411, n.; *Hibbert v. Hibbert, Colly. Partn.* 123.

(d) 1 Mad. Ch. 411, n.

(e) *Sheffield Gas Consumers' Company v. Harrison*, 17 Beav. 294. See also as to agreements to form a company, *Stocker v. Wadderburn*, 3 K. & J. 393.

(f) Per Sir William Grant, in *Jones v. Jones*, 12 Ves. 188.

(g) 1 Mad. Ch. 361.

(h) *Buxton v. Lister*, 3 Atky. 385; *City of London v. Nash*, 3 Atky. 512; S. C. 1 Ves. Sen. 12.

(i) *Paxton v. Newton*, 2 Sm. & Gif. 437.

(k) Per Lord Kenyon in *Errington v. Aynesley*, 2 Bro. C. C. 343; S. C. 2 Dick. 692. Accordingly *Lucas v. Commerford*, 3 Bro. C. C. 166.

(l) *Mosely v. Virgin*, 3 Ves. 184. (m) *Flint v. Brandon*, 8 Ves. 159.

§ 50. On the ground of both of these reasons, specific performance was refused in a recent case(*n*) of an agreement for the execution of a branch railway, which was entered into during the pendency of the bill before parliament, and when several of the directors had thoughts of withdrawing the bill, and, as the plaintiffs alleged, would have done so, but for the agreement in question : and in other cases, specific performance has been refused of agreements for the working of quarries(*o*) and coal mines.(*p*)

§ 51. There are however exceptional cases on such contracts, in respect of which the court will interfere. Lord Rosslyn, in a judgment which appears never to have been overruled, maintained that where an agreement for building is in its nature defined, the court might without much difficulty entertain a suit for its performance ;(*q*) and Mr. Justice Story argues in support of this view.(*r*) It may also be added that in Scotland many contracts to build are specifically performed, in respect of which equity would decline jurisdiction in England,—the Scotch courts appointing some properly qualified person, under whose superintendence the work is directed to be executed.(*s*)

§ 52. But whether the court will, or will not, interfere to enforce all such contracts where definite, it appears to be settled that it will assume jurisdiction where we have the *two circumstances,—first, that [*21] the work to be done is defined, and secondly, that the plaintiff has a material interest in its execution, which cannot adequately be compensated for by damages. Thus the court enforced on a railway company an agreement to make and keep an archway through their railway to connect lands of the plaintiff, severed by the railway :(*t*) and in another case(*u*) it specifically carried out a similar agreement, although its terms were more general and difficult to execute.

§ 53. To the same principle we may perhaps refer a case(*v*) in which Sir John Leach compelled a defendant to alter the elevation of a house which had been erected in contravention of a covenant ; and another,(*w*) in which Lord Eldon, though expressing a difficulty in decreeing repairs to be done affirmatively, yet by means of an injunction, in fact granted performance of a covenant to keep a canal and arch in repair for the benefit of the lessee of a mill interested in them.

§ 54. The part-performance of a contract may give the court jurisdiction where it would not otherwise have it. Thus, where the plaintiff had sold lands to the defendants, they by the deed of sale covenanting forthwith to make a road and erect a market-house on the land, and they entered and made the road, but neglected to build the market-house,

(*n*) South Wales Railway Company v. Wythes, 1 K. & J. 186 ; S. C., 5 De G. M. & G. 880.

(*o*) Booth v. Pollard, 4 Y. & C. Ex. 61. (*p*) Pollard v. Clayton, 1 K. & J. 462.

(*q*) Mosely v. Virgin, 3 Ves. 184. See also Brace v. Wehnert, Week. Rep. 1857-1858, 425, (M. R.)

(*r*) Eq. Juris. § 728.

(*s*) Clark v. Glasgow Assurance Company, 1 M'Queen, 668.

(*t*) Storer v. Great Western Railway Company, 2 Y. & C. C. C. 48.

(*u*) Saunderson v. Cockermouth and Workington Railway Company, 11 Beav. 497.

(*v*) Franklyn v. Tuton, 5 Mad. 469. (*w*) Lane v. Newdigate, 10 Ves. 192.

Vice-Chancellor Wigram observed that the defendants having had the benefit of the contract in specie, the court would go any length that it could to compel them to perform their contract in specie.(x) It is to be remarked that both in this case and in the one previously quoted of [*22] *Storer v. Great Western Railway Company,(y) the plaintiff having parted with the land, had no opportunity of doing the work which the defendants had contracted to do, and so ascertaining the amount of damages sustained by their non-performance;(z) and it seems that in no case will part-performance enable the court to intervene where it has no jurisdiction in the original subject-matter of the contract.(a)

§ 55. Where the act alleged as part-performance is one proper to be brought before a jury and can be answered in damages, non-performance of the rest of the contract does not constitute that fraud which is the origin of the court's jurisdiction in cases of part-performance in this respect, as well as when treated as an exception to the Statute of Frauds.(b)

§ 56. The relation established by the contract of hiring and service is of so personal and confidential a character that it is evident such contracts cannot be specifically enforced by the court against an unwilling party with any hope of ultimate and real success; and accordingly the court now refuses to entertain jurisdiction in regard to them.

§ 57. In former times this seems to have been otherwise. In a case(c) decided by Lord Cowper and the house of lords, there was an agreement by which a skilled person had bound himself during his life as manager and overseer to a company engaged in the manufacture of brass, and the company had agreed to pay him a certain salary and 3s. 6d., for every hundredweight of brass wire made by him or any other person for them during his life; on a bill by the manager, Lord Cowper decreed the payments according *to the articles for past services, and specific [*23] performance of them for the future, by the plaintiff's again repairing to the works and acting according to the articles, if the defendants should require the same. The appeal from this decree to the house of lords was by the plaintiff on a point of the construction of the agreement as to the 3s. 6d. per ton, which resulted in a modification of the decree according to his contention. And so in another case(d) Lord Hardwicke specifically enforced an agreement by the East India Company to employ a man as a packer.

§ 58. But the difficulty of carrying out such contracts in specie is now admitted by the court. Thus, in a recent case,(e) where the plaintiffs

(x) Price v. Corporation of Penzance, 4 Ha. 506. See also Saunderson v. Cockermouth and Workington Railway Company, 11 Beav. 497; Pembroke v. Thorpe, 3 Sw. 437, n.

(y) 2 Y. & C. C. C. 48.

(z) Per Wood V. C., in South Wales Railway Company v. Wythes, 1 K. & J. 200.

(a) Kirk v. Bromley Union, 2 Phil. 640, 648.

(b) South Wales Railway Company v. Wythes, 1 K. & J. 186, and see infra, § 405, et seq.

(c) Ball v. Coggs, 1 Bro. P. C. 140. This case involves the validity of contracts of service for life; as to which see also Wallis v. Day, 2 M. & W. 273.

(d) East India Company v. Vincent, 2 Atky. 83.

(e) Johnson v. Shrewsbury and Birmingham Railway Company, 3 De G. M. & G. 914.

had contracted, for a specified sum, to work the line of a railway company and to keep the engines and rolling stock in repair, the court, considering this to be an agreement for services, refused to enforce it. "We are asked," said Lord Justice Knight Bruce,(f) "to compel one person to employ against his will another as his confidential servant, for duties with respect to the due performance of which the utmost confidence is required. Let him be one of the best and most competent persons that ever lived, still, if the two do not agree, and good people do not always agree, enormous mischief may be done."

§ 59. So in a previous case(g) a grant having relation to an office of a personal and confidential character, was held to be incapable of being specifically enforced; and in another instance,(h) where an indenture was held to constitute the relation of master and servant, and not of partner, Lord Chancellor Truro dissolved an injunction which had been previously granted, restraining the defendant from excluding the plaintiff from the management of the business.

*§ 60. It is no objection in specific performance, that the subject-matter with which the contract deals was not originally [*24] within the jurisdiction of the court, as the contract itself may give the court jurisdiction in specific performance, just as it gives a court of law jurisdiction to award damages. The original jurisdiction in respect of the boundaries of our plantations in North America resided in the king and council; but a contract respecting them having been entered into between adjoining proprietors, was held by Lord Hardwicke to give the court jurisdiction;(i) and on the same principle, although the court has no jurisdiction in matrimonial causes, yet, where there has been an agreement or covenant, it may interfere to enforce the execution of a proper separation deed, or to restrain the breach of a covenant contained in it.(k)

§ 61. And so again contracts entered into abroad may, by the residence of the parties in this country, fall under the jurisdiction of equity and be specifically enforced; thus, for instance, a marriage contract made in France was specifically executed here, the parties to it having come to this country as refugees.(l)

§ 62. But where the court is called upon to exercise this jurisdiction in respect of foreign contracts, the question is not only whether the contract is valid according to the law of the country in which it was entered into, but whether or not it is consistent with the law and policy of this country.(m) It is further to be observed that the contract, if from its nature it falls within the fourth section of the Statute of Frauds, must satisfy the terms of that section, though, in the country where the contract was made, it *might be valid without writing: for that section applies to the procedure, and not to the solemnities of the [*25] contract.(n)

(f) p. 926.

(g) Pickering v. Bishop of Ely, 2 Y. & C. C. C. 249.

(h) Stocker v. Brocklebank, 3 M'N. & G. 250.

(i) Pen v. Lord Baltimore, 1 Ves. Sen. 444.

(k) Wilson v. Wilson, 1 Ho. Lords, 538; S. C. 14 Sim. 405; 5 Ho. Lords, 40.

(l) Foubert v. Turst, 1 Bro. P. C. 129.

(m) Hope v. Hope, 26 L. J. Ch. 417, (L. J. J.)

(n) Leroux v. Brown, 12 C. B. 801.

§ 63. This jurisdiction is not confined to cases of personal contracts, but extends to those relating to real or immovable property, when the parties who have entered into it are resident within the jurisdiction of the court; *aequitas agit in personam*. Therefore where Sir Philip Carteret, the owner of the Island of Sark, had mortgaged it, and a bill was brought against him by the mortgagee for foreclosure, a plea put in by the defendant, that the island was not within the jurisdiction of chancery, was overruled.(o)

§ 64. It must be observed that the court will never lend its assistance to enforce the specific execution of contracts which are voluntary, or where no consideration emanates from the party seeking performance,(p) even though they may have the legal consideration of a seal; and this principle applies, whether the contract insisted on be in the form of an agreement, a covenant, or a settlement.(q)

§ 65. Where a plaintiff had proceeded at law and recovered damages for breach of the contract, he cannot afterwards sue in equity for its specific performance.(r)

[*26]

CHAPTER II.

OF CONTRACTS WITH A PENALTY.

§ 66. FROM the principles stated in the last chapter, it appears that where an agreement is substantially performed by the payment of a sum of money, the jurisdiction of law being adequate, equity will not interfere. Hence, in cases where a clause for the payment of a penal sum is added to an agreement, the question arises whether the contract will be satisfied by its payment, or whether it will not. In the former case, equity will not interfere; in the latter, it may.

§ 67. The question always is, What is the agreement? Is it that one certain thing shall be done, with a penalty added to secure its performance? or is it that one of two things shall be done, namely, the performance of the act or the payment of the sum of money? If the former, the fact of the penalty being annexed will not prevent equity from enforcing performance of the very thing, and thus carrying out the inten-

(o) *Toller v. Carteret*, 2 Vern. 495; *Arglasse v. Muschamp*, 1 Vern. 75; *Jackson v. Petrie*, 10 Ves. 164; *Lord Portarlington v. Soulby*, 3 My. & K. 104, 108; *Story, Eq. Juris.* § 743.

(p) *Groves v. Groves*, 3 Y. & J. 163; *Houghton v. Lees*, 1 Jur. N. T. 862, (*Stuart, V. C.*); *Ord v. Johnston*, id. 1063, (*Stuart, V. C.*)

(q) *Jeffreys v. Jeffreys*, Cr. & Ph. 138; *Hervey v. Audland*, 14 Sim. 531. See the older cases discussed in 1 *Mad. Ch.* 413.

(r) *Sainter v. Ferguson*, 1 M'N. & G. 286. As to orders for the plaintiff to elect, see *Ambrose v. Nott*, 2 Ha. 649; *Fenning v. Humphrey*, 4 Beav. 1; *Gedye v. Duke of Montrose*, *Week. Rep.* 1856-1857, 537, (*Wood, V. C.*); *Seton Decrees*, 492 et seq.

tion of the parties : (a) if the latter, the contract is satisfied by the payment of a sum of money, and there is no ground for equitable procedure against the party having the election.

§ 68. The distinction before us is the same as that between a penalty and liquidated damages, which arises at law on deeds or agreements, but in equity also on bonds. *The distinction being cognizable in both courts in the former case, is of itself no ground to support [*27] a bill in equity. (b)

§ 69. In deciding on this question, the court will look at the whole agreement, and will not be guided by the mere words in which the penal sum is expressed. Thus, where the word "penalty" is used, the court may treat the sum as liquidated damages, (c) and where the words "liquidated damages," as a penalty. (d) Nor is it material that the contract may be alternative in its form, if the court can clearly see that it is essentially an agreement to do one of the alternatives: so that where there was an agreement to renew a certain lease, with an addition of three years to the original term, or to answer the want thereof in damages, the court decreed specific performance of the lease, the second alternative only expressing what the law would imply. (e) Each case must therefore be considered on its own terms; but the decided cases furnish some guide.

§ 70. Where the amount of the penalty is small, as compared with the value of the subject of the agreement, it has been considered a reason for treating the sum reserved as a mere penalty, and not in the nature of an alternative agreement; (f) and the court has no difficulty in decreeing specific performance to an amount greater than that of the penalty.

§ 71. Thus, where a man, being very uncertain what estate he should derive from his father, entered into a bond in £5000, on the marriage of his daughter, to settle one-third of such property, and the agreement so to settle was recited in the condition, it was specifically performed in full and not up to £5000 only; (g) and where two persons *entered [*28] into articles for the sale of an estate, with a proviso that, if either side should break the agreement, he should pay £100 to the other, and the defendant, by his answer, insisted that it was the intention of both parties that, upon either paying £100, the agreement should be absolutely void, Lord Hardwicke nevertheless decreed specific performance of the agreement to sell. (h) In another case, (i) the condition recited an agreement for a settlement comprising a sum of money and also real estate: the penalty was double this sum of money, but had no relation to the real estate; the court granted specific performance of the agreement embodied in the condition. And where a father, in consider-

(a) *Howard v. Hopkins*, 2 Atk. 371; *French v. Macale*, 2 Dr. & W. 269; *Roper v. Bartholomew*, 12 Pri. 797.

(b) *Ranger v. Great Western Railway Company*, 5 Ho. Lords, 73.

(c) *Jones v. Green*, 3 Y. & J. 298. (d) *Cole v. Sims*, 5 De G. M. & G. 1.

(e) *Finch v. E. of Salisb.*, Finch, 212.

(f) *Chilliner v. Chilliner*, 2 Ves. Sen. 528.

(g) *Hobson v. Trevor*, 2 P. Wms. 191. (h) *Howard v. Hopkins*, 2 Atk. 371.

(i) *Prebble v. Boghurst*. 1 Sw. 309.

ration of his daughters giving up a part of their interest in the property, agreed to make up their incomes arising out of it to £200 a year, and entered into a bond for the payment of such sum as might be needful for that purpose, and the bond recited the agreement, the court took this as evidence of the agreement, and accordingly granted relief on the foot of it beyond the bond;(*k*) and in a case which went to the house of lords, an agreement to leave property, contained in the condition of a bond, was held not to be satisfied by the penalty, but was specifically performed.(*l*)

§ 72. The fact that the benefit of the agreement would result to one person or flow in one channel, and the benefit of the sum, if paid, in another, is a strong circumstance against considering the agreement as alternative in its nature: thus, where, on a marriage, the husband's father gave a bond for the payment of £600 to the wife's father, his executors or administrators, in the penalty of £1200 if he did not convey certain lands for the benefit of the husband *and wife and [*29] their issue, Lord Hardwicke held that the obligor was not at liberty to pay the £600, or settle the lands, at his election, but compelled the specific performance of the agreement to settle,—grounding himself in part on this, that the £600 would not have gone to the benefit of the husband and wife and their issue, but of the wife's father and his representatives.(*m*)

§ 73. Where the sum reserved is single, and the act stipulated against is in its nature continuing or recurring, as, for instance, particular modes of cultivating a farm, the sum will be considered as a penalty:(*n*) and so where the plaintiff and defendant were partners, but it was agreed that the plaintiff should alone conduct the business, and the defendant should have the use of a particular room in the house whenever he desired, and, to secure this, the plaintiff gave the defendant a bond in £500, this was held to be a security, and accordingly the court restrained a suit for the penalty, and granted an issue *quantum damnificatus* to try the real damage.”(*o*)

§ 74. Where, in a lease, the sum to be paid for the infraction of any stipulation is an increased rent during the whole term, the court looks on it as an alternative rent in the nature of liquidated damages. This was decided by the house of lords in the case of *Rolfe v. Peterson*,(*p*) where it was held—reversing a decision of Lord Camden—that, in an action brought for recovering a sum thus reserved, a court of equity ought not to interpose, or give any relief. So where a lessee covenanted not to plough any land, and if he did, then to pay twenty shillings per acre per annum, the court refused to enjoin him from ploughing the land.(*q*) Again, where a lease was entered into subject to a rent pay-

(*k*) *Jeudwine v. Agate*, 3 Sim. 141.

(*l*) *Logan v. Wienholt*, 1 Cl. & Fin. 611; S. C. 7 Bli. N. S. 1. See also *Butler v. Powis*, 2 Coll. C. C. 156.

(*m*) *Chilliner v. Chilliner*, 2 Ves. Sen. 528; *Roper v. Bartholomew*, 12 Pri. 797.

(*n*) *French v. Macale*, 2 Dr. & W. 269.

(*o*) *Sloman v. Walter*, 1 Bro. C. C. 418.

(*p*) 2 Bro. P. C. 436.

(*q*) *Woodward v. Gyles*, 2 Vern. 119.

able, *and to certain yearly payments to be made by the lessee [*30] in case he should not manage the farm as specified in his lease, and also in case, in the last three years of his term, he should sow more than seventy acres of clover in one year, to an additional rent of £10 per annum for every acre above the seventy acres, the additional rents were held to be in the nature of liquidated damages.(r) And where there was a covenant against erecting a weir, under the penalty of double the yearly rent, thercinafter reserved, to be recovered by distress, this, notwithstanding that the sum was spoken of as a penalty, was held to be liquidated damages; the power of distress is a strong circumstance in that direction.(s)

§ 75. But where, in addition to the increased rent, there is a stipulation that the act provided against shall be a forfeiture of the covenantor's interest, the sum is held to be a penalty, and not liquidated damages.(t)

§ 76. Where the agreement would be unreasonable unless it gives an option to the person stipulating to pay the sum, this will be a strong circumstance for treating that as liquidated damages, and the agreement as alternative. So where a lady, administratrix of her husband, covenanted, under a penalty of £70, to renew a sub-lease as often as she obtained a renewal of the head-lease, and it appeared that the fines on the head-lease were raised on renewal, according to the then value of the property, so as to render her covenant unreasonable except upon the construction of its giving her an option, the house of lords treated the sum as liquidated damages.(u)

§ 77. If there are sums made payable in case certain *acts are not done, and the performance is over and above this secured by [*31] a penalty, this is a reason for holding the first sums to be liquidated damages :(v) but lord Hardwicke appears not to have thought this a conclusive argument, and in one case, notwithstanding this circumstance, granted specific performance of the agreement.(w)

§ 78. From the nature of the case, specific performance of stipulations protected by a penal sum will often be by way of injunction; and the court will not, on an interlocutory application to dissolve an injunction, decide the question whether the sum is a penalty or liquidated damages, but will only consider whether there is a *prima facie* case for an injunction, and whether more mischief will be done by granting than by withholding it.(x)

(r) Jones v. Green, 3 Y. & J. 298.

(s) Gerrard v. O'Reilly, 3 Dr. & W. 414; French v. Macale, 2 Dr. & W. 269. The old cases of City of London v. Pugh, 4 Bro. P. C. 395, and Webb v. Clarke, 1 Fonbl. Eq. 154, appear at variance with the rule as now established.

(t) French v. Macale, 2 Dr. & W. 269. (u) Magram v. Archbold, 1 Dow. 107.

(v) Ranger v. Great Western Railway Company, 5 Ho. Lords, 73.

(w) Chilliner v. Chilliner, 2 Ves. Sen. 528.

(x) Cole v. Sims, 5 De G. M. & G. 1.

P A R T I I.
OF PARTIES TO THE SUIT.

[*32]

*C H A P T E R I.

O F T H E G E N E R A L R U L E.

§ 79. THE general rule is that the parties to the contract ought alone to be parties to the suit. The contract is what constitutes the rights and regulates the liabilities of the parties: in a stranger there is no liability; and against him, therefore, there is no more right to enforce specific performance in equity than to recover damages at law.(a) It makes no difference, that the stranger to the contract may be a necessary party to the conveyance, as a judgment creditor, or mortgagee, or a person interested in the equity of redemption.(b) And so where a steward was made a party as being receiver of the rents, and having the title-deeds in his possession, the bill was dismissed as against him.(c) And in a suit to enforce a contract made by a mortgagee, under, a power of sale, the mortgagor is not a necessary party.(d)

[*33] *§ 80. The principle now before us was strongly illustrated by the case of Robertson v. The Great Western Railway Company.(e) The plaintiff had agreed to sell to the defendants a piece of land, and to buy up the right then vested in his tenant; the defendants having entered before payment of the purchase-money, they were served with notices not to trespass on the land, both by the plaintiff and his tenant. The plaintiff then brought his bill for a specific performance and to restrain the trespass, to which the defendants demurred, on the ground that the tenant was not a party; the vice-chancellor of England allowed the demurrer, considering that, two persons being affected by the injury, the court must have them both before it; but the demurrer was overruled by the lord chancellor, on the ground that the object of the suit was a specific performance, and that the company might be restrained from entering without payment of the purchase-money, whether that entry did or did not affect the tenant.

§ 81. By the general principles of the court, parties having adverse or inconsistent rights in the subject-matter of the suit cannot be joined

(a) Mole v. Smith, Jac. 490; Tasker v. Small, 3 My. & Cr. 63, 69; Wood v. White, 4 My. & Cr. 460, 483; Humphreys v. Hollis, Jac. 73; Patterson v. Long, 5 Beav. 186; Peacock v. Penson, 11 Beav. 355.

(b) Tasker v. Small, ubi sup., overruling S. C. 6 Sim. 625, 636; cf. Sober v. Kemp, 6 Ha. 155, (a mixed case of specific performance and foreclosure.) See also Petre v. Duncombe, 7 Ha. 24, (a purchaser's bill,) and Lord Leigh v. Lord Ashburton, 11 Beav. 470, (a vendor's bill,) from which it appears that judgment creditors, though not necessary, may be proper parties.

(c) Macnamara v. Williams, 6 Ves. 143.

(d) Corder v. Morgan, 18 Ves. 344; Ford v. Heely, (Stuart V. C.) 3 Jur. N. S. 1116.

(e) 1 Rail. C. 459; S. C. 10 Sim. 314.

as plaintiffs; (*f*) nor can a person who has no interest be joined as plaintiff with one who has. (*g*) The importance of the doctrine of mis-joinder is now, however, diminished by the 49th section of the act to amend the practice of the Court of Chancery. (*h*) In some cases, persons claiming adversely may be made defendants. (*i*)

§ 82. A sub-purchaser, or person claiming an interest by purchase from the purchaser, is not generally a proper party to a bill. Therefore, in a case (*k*) before the *vice-chancellor of England, where a purchaser undersold, and the bill was brought by the vendor against [*34] both purchaser and sub-purchaser, it was dismissed as against the latter, though specific performance was decreed against the original contractor; and this was affirmed by Lord Chancellor Lyndhurst, after two arguments before him: and the same doctrine has recently been stated by Lord Justice Turner. (*l*)

§ 83. A case (*m*) before Lord Justice Knight Bruce, when a vice-chancellor, requires to be stated, as it appears to present a distinction that is to be observed. There A. had contracted to purchase an estate from B., having previously agreed with C. to sell the estate to him, and a contract to that effect was afterwards entered into between A. and C. A. and C. subsequently brought a bill for performance against B., and it was held that they were both proper parties. Here it will be observed that there was an agreement, under which C. claimed an interest, prior to the contract with B., and both might perhaps be, in some sense, treated as parties to the contract. The vice-chancellor considered that *Tasker v. Small*, (*n*) had little or no application to the case before him, (*o*) and appears to have rested his decision on the ground that both the plaintiffs had, at the institution of the suit, an interest in the subject-matter of it. (*p*) And it has been held that if A. contract to purchase from B., and A. then contract with C. that B. shall convey to C., and B. have notice thereof, A. cannot enforce the contract against B. without joining C. as a party. (*q*)

§ 84. The cases in which persons claiming derivative interest from the vendor are made parties, will be subsequently considered. (*r*)

§ 85. To the general rule as above laid down, it will be *found [*35] that many exceptions arise: some of these will be noticed in the subsequent chapters. But there are other exceptions, or apparent exceptions to the strict rule, which may well be stated here.

§ 86. One case where the parties to the original contract are not those to the suit, is where there has been a novation or new contract substituted for the original one by the intervention of a new person, in which case

(*f*) *Fulham v. McCarthy*, 1 Ho. Lords, 703; *Padwick v. Platt*, 11 Beav. 503.

(*g*) S. C. and per Lord Lyndhurst, in *King of Spain v. Machado*, 4 Russ. 240. See also *Pearce v. Watkins*, 9 Ha. 315.

(*h*) 15 & 16 Vict. c. 86.

(*i*) See post, § 96.

(*k*) *Cutts v. Thody*, 1 Coll. C. C. 223; *Anon. v. Walford*, 4 Russ. 372.

(*l*) *Chadwick v. Maden*, 9 Ha. 188.

(*m*) *Nelthorpe v. Holgate*, 1 Coll. C. C. 203.

(*n*) 3 My. & Cr. 63, ante, § 79.

(*o*) 1 Coll. C. C. 211.

(*p*) p. 218.

(*q*) *Anon. v. Walford*, 4 Russ. 372.

(*r*) See § 135 et seq.

the party in whose place the new person is introduced is no longer a party to the contract, and therefore ceases to be a proper party to the suit, which must be carried on between the parties to the new contract. Thus, where A. agrees to sell to B., and before completion, B. contracts to sell to C., and A. deals with C. as the purchaser, this may amount to a new contract; and even where it does not strictly do so, B. may be an unnecessary party to the suit.^(s) And so, again, where a railway company had entered into an arrangement with a landowner, and during the proceedings before parliament an agreement was entered into between that company and a rival company for referring the two bills to certain persons, and that the successful company should take to all the engagements of the other, and, in accordance with the award, the company which had contracted with the landowner withdrew his bill, it was held that the landowner could enforce the agreement against the other company, who had thus adopted it.^(t)

§ 87. The 32nd Hen. VIII., c. 34, which gives to reversioners the benefit of covenants entered into with their predecessors in title, authorizes, it seems, a suit in equity for the specific performance of the covenant. As at law,^(u) so in equity, the statute gives the benefit to the successive *reversioners only as they come into possession of the [*36] estate; but when thus entitled, they have a right to the performance of the covenant *modo et forma*, irrespectively of the damage which may accrue from its breach.^(v)

§ 88. The reversioner entitled in remainder and not in possession may, however, have a right to enforce the covenant; but this right is not simply to the performance of it *modo et forma*, but depends on his showing that he would, as reversioner, sustain some material damage by reason of its breach.^(w) This follows the analogy of law, where the reversioner, to enable him to sue as such, must show some special damage;^(x) the doctrine in both courts, seeming to depend on the nature of the plaintiff's interest in the estate diminishing his interest in the breach of the covenant, and the principle expressed by the maxim *de minimis non curat lex*.

§ 89. In cases of contracts under powers, the question sometimes arises, whether a contract entered into by the donee of the power can be enforced by or against the remainderman, the cases in which he can sue or be sued being, of course, co-extensive. The rule by which this question is decided is that the contract is binding in those cases, and those cases only, in which it might have been enforced against the donee of the power himself, independently of any conduct on his part.^(y) The grounds on which part-performance by a tenant for life will not bind the

(s) Holden v. Hayn, 1 Mer. 47; Hall v. Laver, 3 Y. & C. Ex. 191; Shaw v. Fisher, 5 De G. M. & G. 596.

(t) Stanley v. Chester and Birkenhead Railway Company, 9 Sim. 264; 3 My. & Cr. 773. See also post, § 684 et seq.

(u) Isherwood v. Oldknow, 3 M. & S. 382.

(v) Johnst. v. Hall, 2 K. & J. 414.

(w) S. C.

(x) Jackson v. Pesked, 1 M. & S. 234; Baxter v. Taylor, 4 B. & Ad. 72; Mumford v. Oxford Railway Company, 25 L. J. Ex. 265; Simpson v. Savage, 1 C. B. N. S. 349.

(y) Morgan v. Milman, 10 H. 279; S. C. 3 De G. M. & G. 24; Lowe v. Swift, 2 Ball & B. 529.

remainderman, will be considered when we come to treat of the principles of that subject.(z)

§ 90. The court has no jurisdiction to enforce the contracts of a tenant in tail against those in remainder.(a)

* § 91. In the case of a contract for the sale of a bankrupt's property by the creditors' assignees, the official assignee, being [*37] the proper hand to receive the money, appears to be a necessary and proper party to a suit for the specific performance of the contract.(b)

§ 92. Where the circumstances of the case may be fitting, some may, of course, sue for specific performance on behalf of all: thus the directors of a joint-stock company were allowed to sue on an agreement to make a lease to them, without joining all the shareholders.(c) But in the converse ease, there is great difficulty, in applying to specific performance, the principle that some may be sued on behalf of all: from the nature of such suits, however, this application of the principle is not often required for the ends of justice. In one case,(d) a joint-stock company established by an act of parliament, which vested in them all property then belonging to them and authorized them to bring actions in the name of their treasurer, purchased an estate, with notice of a prior agreement by the owner to grant a lease of part: on a bill by this proposed lessee against the directors and treasurer, but not the other proprietors, asking for a specific performance of the agreement, Sir William Grant said, that though he could bind the interests of parties not before the court, he could not compel them to do an act, and that the execution of the lease by a few on behalf of all would hardly be sufficient, supposing it proper. He, however, gave the plaintiffs all the relief he could, by enjoining the treasurer from disturbing their possession, though he could not compel specific performance of the agreement.

§ 93. There are a few cases in which the strict rule that none but the parties to a contract are proper parties to a suit for its specific performance, appears to have been relaxed, to avoid multiplicity of suits.

* § 94. To this principle we may probably refer the case of [*38] Lowther v. Viscountess of Andover,(e) where a father entered into a covenant with the trustees of his daughter's marriage settlement to endeavour to purchase certain remainders in estates of which he was tenant for life, and, when purchased, to convey them to the uses of the settlement. The covenantor died, having previously entered into an agreement for the purchase of the remainders: on a bill filed by the trustees of the settlement against the vendors, and it would seem also the personal representative of the deceased, specific performance was granted. In another case,(f) where the Duke of Chandos had granted to A. a lease of a lodge, and also the deputation of a keepership in Enfield Chase, and A. assigned but for part of the terms only to B., B.

(z) See post, § 389.

(a) 3 & 4 Wm. IV., c. 74, s. 45.

(b) 12 & 13 Vict., c. 106, s. 39.

(c) Taylor v. Salmon, 4 My. & Cr. 134.

(d) Meux v. Maltby, 2 Sw. 277.

(e) 1 Bro. C. C. 396. As to creditors of a deceased vendor suing, see Johnson v. Legard, T. & R. 281.

(f) Jalabert v. Duke of Chandos, 1 Ed. 372.

was allowed to maintain a bill against the duke and A. for the rectification of a mistake in the original grant by the duke, and for a new and sufficient grant by him.

§ 95. The same principle is illustrated by another case, (g) in which a bill was filed by a purchaser against trustees for sale, to enforce the specific performance of an agreement for the sale of lot A : it was resisted on the ground that by an arrangement, to which the plaintiff was a party, part of that lot as originally described was taken from it and given to the adjoining lot, B. The bill was amended to put in issue this averment, which came out in the answer, but without adding as defendant the purchaser of lot B ; and the court held that he ought to have been made a defendant, for otherwise the vendors would be exposed to another suit from the purchaser of lot B.

§ 96. And where there are claims made by persons, strangers to the contract, adversely to both the parties to it, they may, under some circumstances, be made defendants *to a suit for the performance [^{*39}] of it. Thus, where an assignee under an insolvency sold a reversionary interest in stock of the insolvent, and the purchaser was served with notice not to pay the purchase-money to the assignee by a person claiming under a previous assignment by the insolvent subsequent to his insolvency, a bill was brought against the assignee and the adverse claimant, and prayed an inquiry into the rights of the latter: he was, in the event decreed, to pay costs.(h)

§ 97. And so, in the case of purchases from a voluntary settlor, where the contract is enforced by a purchaser, it seems proper to make defendants, not only the vendor, but the trustees of the settlement and the persons beneficially interested under it.(i)

§ 98. Wherever a contract is entered into by a trustee on behalf of another person, and the person thus beneficially interested seeks to enforce the contract, the trustee is a necessary party to the suit; for otherwise another suit might become necessary against him.(k)

§ 99. Cestuis que trust are not generally necessary parties to suits by or against trustees :(l) but it would seem that they should still be made parties in any case, where the trustees by themselves are unable to enter into a valid contract, or where the parties beneficially interested are entitled to be heard to dispute the right of the trustees to exercise the power under which the contract has been made.(m)

§ 100. It may be added that each contract of a vendor with a purchaser being separate, is properly the subject of a several suit; and where several purchasers have been joined in one suit, a demurrer for multifariousness has been allowed.(n)

[*40] *§ 101. But in a case in which there had been several sales of a like kind, and several purchasers joined as plaintiffs, and

(g) *Mason v. Franklin*, 1 Y. & C. C. 239.

(h) *Collett v. Hever*, 1 Coll. C. C. 227, before Lord Cottenham.

(i) *Willets v. Busby*, 5 Beav. 193.

(k) *Cope v. Parry*, 2 J. & W. 538; *Cooke v. Cooke*, 2 Vern. 36.

(l) 15 & 16 Vict. c. 86, s. 42, rule 9.

(m) *Evans v. Jackson*, 8 Sim. 217; *Saunders v. Richards*, 1 Coll. C. C. 568.

(n) *Rayner v. Julian*, 2 Dick. 677; *Brookes v. Lord Whitworth*, 1 Mad. 86.

the persons interested in the estate made no objection for multifariousness, the court decreed specific performance of the different contracts in one suit.(o)

*CHAPTER II.

[*41]

OF A STRANGER TO THE CONTRACT.

§ 102. THE principle obtains both at law and in equity, that a stranger to the contract cannot sue on it: and this is not varied by the mere fact that the stranger takes a benefit under it, except in certain cases which will be afterwards mentioned.(a)

§ 103. Thus in a recent case,(b) where protracted litigation had been undertaken by A. for the recovery of an estate, and in the course of these proceedings A. became greatly indebted to his solicitor, and, by an agreement between A. and his brother B., A. agreed to relinquish his interest in the estate to B., in consideration of B.'s undertaking to pay the costs already incurred, with interest, it was held that the solicitor being no party to the agreement, and having given no consideration for it, could derive no benefit under it capable of being enforced by him.

§ 104. The case of *Hook v. Kinnear and Philips*,(c) which may appear at first sight at variance with the principle *above-stated, seems to depend on a different doctrine, namely, that of agency. There [*42] the two defendants were tenants in common of certain lands, and the defendant Kinnear having been tenant of Philips's moiety, and in arrear to him for the rent, agreed with Philips to execute to the plaintiffs such lease of the entire premises as Philips and the plaintiff should agree upon, and that all the rent should be paid to Philips till the arrears due to him were satisfied; the plaintiff was no party to the agreement: Philips entered into an agreement with the plaintiff for a lease of the premises at £30 per annum, and executed a lease of his moiety at £15 per annum: the defendant declined to do the same in respect of his moiety: and it was objected that the plaintiff as a stranger could not sue: but Lord Hardwicke overruled the objection, on the ground that Philips might be taken as the agent of the plaintiff in the contract, and compared it to the case of stewards entering into agreements, and their masters enforcing them.

(o) *Hargreaves v. Wright*, 10 Ha. Appx. 56.

(a) *Crow v. Rogers*, 1 Str. 592; *Ex parte Peele*, 6 Ves. 602; *Ex parte Williams*, Buck, 13; *Berkeley v. Hardy*, 5 B. & C. 355; *Lord Southampton v. Brown*, 6 B. & C. 718. Per Lord Langdale in *Colyear v. Countess of Mulgrave*, 2 Ke. 98; *Hill v. Gomme*, 5 My. & Cr. 250, 256. The dicta of Eyre, C. J. in *Fellmakers' Company v. Davis*, 1 B. & P. 102, and of Mr. J. Buller in his N. P. p. 134, do not appear to be law. The Scotch law differs from ours in this particular, recognizing the *jus quasitum tertio*. *Stair, Inst. B. i. t. 10*, s. 5.

(b) *Moss v. Bainbrigge*, 18 Beav. 478, 482; S. C. on appeal, 6 De G. M. & G. 292.

(c) 3 Sw. 417, n.

§ 105. The exceptions to which the rule before us is subject, seem to be : 1st, in the case of persons claiming as beneficially entitled under marriage-settlements to which they were not parties ; 2ndly, in certain cases of close relationship between a contracting party and the stranger ; and 3rdly, where a partial execution of the contract has changed the status of the stranger, and given him a right to its complete performance.

§ 106. (1) The exception to this general principle in respect of marriage-articles arises from the nature of the contract, in which, not the contracting parties only, but those for whose benefit they contract, and especially the issue of the marriage, are regarded as purchasers, and in that capacity entitled to the specific performance of the articles.

§ 107. With regard to the issue, this is well settled. "In marriage-contracts," said Lord Cottenham, (d) "the *children of the marriage are not only objects of, but *quasi* parties to it."

§ 108. With regard to collaterals also, the same principle is now established, at least as against the parties to the contract other than those through whom the collaterals claim. The old doctrine excluded collaterals : but the court now considers it impossible to ascertain what collateral branches may have been in the view of the contracting parties at the time of the contract, or which of the several stipulations in a contract the parties laid the greatest stress upon. Another principle upon which the court has in some cases proceeded, is that the trustees, being covenants, might sue at law for the non-performance of the covenant to settle, and that, as the measure of the damages to which they would be entitled would be the interests of all their *cestuis que trust*, the collaterals would thus gain the benefit of the covenant ; and that the relief in equity must of course be, at least, commensurate with the damages at law. (e) The leading case upon this subject is *Goring v. Nash*, (f) where Lord Hardwicke specifically executed articles made on the marriage of Sir Robert Fagg's son, by which part of the estate was, after several previous limitations, limited in tail to the plaintiff, who was a younger daughter of Sir Robert Fagg, with remainder to her sisters in tail. Lord Hardwicke held this to be a provision made by the father for his younger children, that as such they were purchasers and clearly entitled to specific performance, and that this right was not affected by the fact that the limitations to the plaintiff and her sisters were subject to a general power of appointment in the father, which by his death without execution had ceased. In many other cases also the court has executed articles at the instance of collaterals, as being within the consideration of the marriage. (g)

*§ 109. The principle that has thus been applied to collaterals [*44] applies also to appointees of the wife, claiming under a power

(d) In *Hill v. Gomme*, 5 My. & Cr. 254.

(e) *Goring v. Nash*, 3 Atky. 186; *Davenport v. Bishop*, 1 Y. & C. C. 451; S. C. 1 Phil. 698.

(f) 3 Atky. 186.

(g) *Edwards v. Countess of Warwick*, 2 P. Wms. 171; *Osgood v. Strode*, id. 245; *Vernon v. Vernon*, id. 594, affirmed, 1 Bro. P. C. 267; *Stephens v. Trueman*, 1 Ves. Sen. 73; *Pulvertoft v. Pulvertoft*, 18 Ves. 84, 92.

inserted in the articles; for, although as between the wife and themselves they are volunteers, yet they take by virtue of a gift made by the wife, who is not a volunteer but a purchaser, and therefore, as between themselves and the husband, they claim under and stand in the place of a purchaser.(h)

§ 110. The case of Sutton v. Chetwynd,(i) before Sir William Grant, offers something of an impediment to this current of authorities. In the will of Lady Bath's mother there was an ultimate remainder given to Sir Richard Sutton, the plaintiff, who was a stranger. On the marriage of Lady Bath it was agreed by articles that the estate in question should, in the events which happened, follow the limitation of this will. The court refused specifically to execute these articles at the suit of the plaintiff. The case as reported appears not to have been approved of by Lord Eldon ;(k) and in a subsequent case(l) it was explained by Lord Cottenham. "The covenant," said his lordship, "was between Lady Bath and the trustees only. There was no consideration moving from them or from Sir Richard Sutton. With respect to Sir James Pulteney (the husband) he merely consented to the settlement. Lady Bath did not covenant with him."

§ 111. It is to be observed that in none of the cases has a collateral enforced the articles against the covenantor solely on the ground of relationship; but in each case, the party who had exacted the stipulation was dead without having in any way released it, and the claimants have sought to stand in the place of the party who, for a valuable [*45] consideration as regards the original settlement, had exacted the stipulation sought to be enforced.(m) It does not therefore follow that the original parties to the settlement could not release it as against collaterals, or that collaterals could enforce it against such parties, supposing them, or those of them through whom the collaterals claimed, to be alive and resisting performance.(n)

§ 112. (2) There is a class of cases where the nearness of relationship of one party to the contract with the party to be benefited by it, is said to give to the latter the benefit of the consideration and a right to sue on the contract. The Physician's case(o) is the leading authority on this point: there A. made a promise to his physician, that, if he would effect a certain cure, he would pay a sum of money to the physician's daughter; and it was held that she might sue. In another case(p) in *assumpsit* the plaintiffs, who were husband and wife, declared that the wife's father, being seized of lands which had subsequently descended to the defendant, was about to fell £1000 worth of timber to raise a portion for his said daughter; and the defendant promised the father that, if he would forbear to fell the timber, he would pay the daughter £1000. A verdict was found for the plaintiffs; but it was

(h) *Campbell v. Ingilby*, 21 Beav. 567, affirmed, 26 L. J. Ch. 654, (L. J. J.)

(i) 3 Mer. 249.

(k) S. C. T. & R. 296.

(l) *In Davenport v. Bishop*, 1 Phil. 704; and see S. C. 2 Y. & C. C. C. 451, 462.

(m) See 2 Spence, Eq. Jur. 284, n.

(n) *Hill v. Gomme*, 1 Beav. 540.

(o) Cited 1 Ventr. 6.

(p) *Dutton v. Pool*, 1 Ventr. 318, 332; per Lord Mansfield in *Martyn v. Hind*, Cowp. 443.

moved, in arrest of judgment, that the father alone could have brought the action, but not the husband and wife: but after two arguments, the objection was overruled on the ground of the nearness of relationship.

§ 113. (3) It seems that another exception may arise to the general principle, that a stranger taking a benefit under a contract cannot sue on it, in cases where the contract is of such a nature and has been so far acted upon as to change the condition in life of the stranger, and to raise *reasonable expectations in him, grounded on the contract. [*46] Such a case might be presented by an agreement between A., a rich man, and B., a poor one, that A. should take B.'s child, bring him up as a gentleman, and leave him certain property, and a part-performance of this on A.'s part. But here, any right which the child of B. might have to insist on the contract is derived, not from the contract itself but from the conduct of A. in pursuance of it, and the wrong which he would sustain, if the contract were carried out in part and not in whole. For no such equity would exist where the contract remained entirely in abeyance.(q)

[*47]

*CHAPTER III.

OF THE DEATH OF A PARTY TO THE CONTRACT.

§ 114. THE general rule, that parties to the contract must alone be parties to the suit, is further modified by certain circumstances, one of which, namely, the death of a party to the contract, will now be considered. By this circumstance, with the exception to be mentioned hereafter,(a) the obligation to perform, and the right to call for the performance of, the contract, devolve on the representatives of the party dying.

§ 115. If the vendor of real estate die before completion, the contract may be enforced either by the purchaser(b) or by the personal representative of the vendor;(c) but in both cases the heir(d) or devisee(e) must be a party, as having an interest in disputing the contract: and it makes no difference that the legal estate is outstanding in a trustee.(f) As a purchaser has no right to insist on having the will proved against the heir, he is not a necessary party where there are devisees of the

(q) Hill v. Gomme, 1 Beav. 540; S. C. 5 My. & Cr. 250; Lyons v. Blenkin, Jac. 245.

(a) See post, § 122.

(b) Hinton v. Hinton, 2 Ves. Sen. 631; Barker v. Hill, 2 Rep. in Ch. 218.

(c) Baden v. Countess of Pembroke, 2 Vern. 212.

(d) Roberts v. Marchant, 1 Ha. 547; S. C. 1 Phil. 370; Lacon v. Mertins, 3 Atky. 1.

(e) Galton v. Emuss, 1 Coll. C. C. 243. As to the cestuis que trust of real estate devised in trust, see now 15 & 16 Vict. c. 86, s. 42, rule 9.

(f) Roberts v. Marchant, 1 Ha. 547.

estate in question.(g) Where the heir is *an infant, a difficulty [*48] formerly arose ;(h) but this is now overcome by the 7th section of the Trustee Act, 1850, by which it is enacted that, where an infant shall be seised or possessed of any lands upon any trust, it shall be lawful for the Court of Chancery to make an order, vesting such lands in such person or persons in such manuer and for such estate as the said court shall direct.(i)

§ 116. Where the vendor leaves a widow, who, but for the contract, would be entitled to freebench, the contract may be enforced against her, and she must be a party ;(k) and the same practice must be pursued in cases of dower of widows married since the 1st of January, 1834.(l)

§ 117. Where a binding contract has been made by a vendor who subsequently dies, it would seem that if the executors decline to enforce the performance, or to compel the purchaser to do so, a suit might be instituted for the purpose of executing the contract by the creditors of the deceased vendor against the executors and heir of the vendor and the purchaser.(m)

§ 118. If the purchaser die before completion, the contract may be enforced either by or against the vendor or the heir or devisee of the purchaser; the personal representative being a party as having an interest in disputing the contract, and as being the hand to pay the purchase-money ;(n) and the heir or devisee of the purchaser being a party as being the person entitled to have the estate conveyed to him, and to insist on a proper inquiry into the title.(o)

§ 119. The heir or devisee has no right to insist on the *completion of a purchase, except where the contract is such as might [*49] have been enforced against his ancestor or testator; for otherwise he would be able to take the purchase-money from the personal estate, in order to purchase for himself that which his ancestor was not bound to purchase, and perhaps never would have purchased.(p)

§ 120. Where, after suit instituted by a vendor against a purchaser, and a reference of title and report in favour of it has been made, the purchaser dies, the court may, on the application of his real and personal representatives, order the plaintiff to revive, or, in default thereof, that his bill shall stand dismissed.(q)

§ 121. Where a person who has agreed to take a lease dies, the executors admitting assets may be compelled to take a lease, the covenants

(g) *Harris v. Ingledew*, 3 P. Wms. 91; *Cotton v. Wilson*, id. 190; *Wakeman v. Countess of Rutland*, 3 Ves. 233; *Morrison v. Arnold*, 19 Ves. 670; *Beales v. Lord Rokeby*, 2 Mad. 227.

(h) *Bullock v. Bullock*, 1 J. & W. 603.

(i) *In re Howard*, 5 De G. & Sm. 435.

(k) *Hinton v. Hinton*, 2 Ves. Sen. 631, 638; *Brown v. Raindle*, 3 Ves. 256.

(l) 3 & 4 Wm. IV. c. 105.

(m) See *Johnson v. Legard*, T. & R. 281; 1 Mad. Ch. 369.

(n) *Buckmaster v. Harrop*, 7 Ves. 341; S. C. 13 Ves. 456, where the residuary legatees were made parties; and see *Holt v. Holt*, 2 Vern. 322.

(o) *Townsend v. Champernowne*, 9 Pri. 130.

(p) *Broome v. Monek*, 10 Ves. 597; *Savage v. Carroll*, 1 Ball & B. 265, 281; *Collier v. Jenkins*, You. 295.

(q) *Norton v. White*. 2 De G. M. & G. 678.

being so qualified as that the executors shall be no further liable thereon than they would have been on the covenants which ought to have been entered into by their testator.(r)

§ 122. An exception to the devolution of the liability to perform contracts, by the death of one of the parties, arises in all cases in which the personal skill or taste of one of the contracting parties is required; for in such cases the death of that party discharges the contract, and exempts his personal representatives from liability for the breach of contracts, occasioned by non-performance after his decease,(s)—an exception obviously grounded on the same principle as the non-assignability of such contracts, hereafter considered.(t) On this principle it has been decided that, if an author contract to complete a work, and die before doing so, his executors will be discharged from *the contract;(u) or, if a [*50] master contract to teach an apprentice, and die before the expiration of the term, his representatives will be equally excused.(v) And in one case an agreement to build a lighthouse was, from the skill and science involved in its performance, held to be a personal contract.(w) This principle would, of course, apply as much in suits for specific performance as in actions for damages.

[*51]

CHAPTER IV.

OF AN ASSIGNMENT OF THE AGREEMENT OR OF THE PROPERTY.

§ 123. In a general way the benefit of an agreement may be assigned in equity, and the assignee can enforce specific performance of it, making his assignor a party.(a) Thus for example, where a lease with a covenant to renew became vested by assignment in the plaintiff, he was held entitled to sue the covenantor for a renewal:(b) and where there was an agreement for a lease, which contained nothing to show that it was made specifically and personally with the assignor, and the assignee was solvent, the agreement was enforced in favour of the assignee.(c) Similarly, where there is nothing personal in the contract or the motives to it, a person who has appeared as agent may afterwards disclose himself

(r) Phillips v. Everard, 5 Sim. 102; Stephens v. Hotham, 1 K. & J. 571. See also Page v. Broom, 3 Beav. 36.

(s) Per Lord Wensleydale in Siboni v. Kirkman, 1 M. & W. 423.

(t) See post, § 126.

(u) Marshall v. Broadhurst, 1 Tyrw. 349; S. C. 1 Crompt. & Jer. 405.

(v) Baxter v. Burfield, 2 Str. 1266.

(w) Per Patteson, J., in Wentworth v. Cock, 10 A. & E. 45.

(a) As to a sub-purchaser, see ante, § 82.

(b) Duke v. Mayor of Exon, 2 Freem. 183. See also Vandenanker v. Desbrough, 2 Vern. 96; Moyses v. Little, id. 194.

(c) Crosbie v. Tooke, 1 My. & K. 431; Morgan v. Rhodes, id. 435. But see Dowell v. Dew, 1 Y. & C. C. 345, where V. C. K. Bruce refused to grant specific performance of an agreement for a lease to an assignee, except upon the terms of the assignor's entering into the covenants of the lease. See post, § 126.

as a principal, and enforce the contract in his own name.(d) And where A. contracted for an estate from B., A. having previously agreed with C. to sell the estate to him, and B. resisted performance on this amongst other grounds; the price being adequate, and *B. not suggesting [*52] that he had ever refused, or was unwilling, or would have objected to treat with C., or might have obtained better terms from him, had he known the real circumstances of the case, specific performance was granted at the suit of A. and C.(e)

§ 124. An assignee of an agreement by way of mortgage may enforce his security by means of specific performance. Thus, in a recent case,(f) it appears to have been decided by Vice-Chancellor Wood, that where A. agreed to sell certain property to B., and then mortgaged his interest under this agreement to C., and C. assigned his mortgage to D., D. might maintain a bill against the purchaser B. for the performance of the original agreement between him and A.

§ 125. The assignability of contracts in equity is however subject to some exceptions and limitations, which mostly fall under one or other of the following classes, viz: (1) where the contract is personal; (2) where the agreement contains a provision against assignment; and (3) where the assignment is illegal or contrary to public policy.

§ 126. (1) It is an obvious principle of natural law, that where the learning, skill, solvency, or any personal quality of one of the parties to the contract is a material ingredient in it, then the contract can be performed by him alone. It may be a matter of indifference to A. whether B. or C. be the purchaser of the stock or shares he is selling; but it is a matter of great moment, whether a distinguished artist, or his nominee paint a picture for which A. may have agreed to pay a certain sum. Accordingly, in the case of contracts of the latter kind, it is not competent to a person, who has appeared as agent for a principal on whose personal qualities reliance has been placed, to show himself *to [*53] be the principal and to sue in his own name :(g) in respect of such contracts bankruptcy confers no claim on the assignees ;(h) and the benefit of such contracts, accordingly, is incapable of being assigned. Thus, where a contract established a personal relation between an author and his publisher, it was held that it was incapable of assignment.(i) So also where a lessee in insolvent circumstances suffered another person to become the apparent owner of the farm, but with a secret trust for himself, and the landlord, supposing the trustee to be the rightful owner and trusting to his solvency, entered into an agreement with him to grant him a new lease, in a suit by the original lessee against the landlord, specific performance of this agreement was refused, the court considering that the landlord had entered into the agreement, expecting to have the covenants of a man of substance, which he could not do, as there

(d) Fellowes v. Lord Gwydyr, 1 R. & My. 83.

(e) Nelthorpe v. Holgate, 1 Coll. C. C. 203.

(f) Browne v. London Necropolis Company, Week. Rep. 1857-1858, 188.

(g) Per Alderson, B., in Rayner v. Grote, 15 M. & W. 365. See ante, § 122.

(h) Per Abinger, L. C. B., in Gibson v. Carruthers, 8 M. & W. 343.

(i) Stevens v. Benning, 1 K. & J. 168.

would be no equity to compel the trustee to enter into the covenants.(k) And so again, if a landlord trusts to the skill of a person who is in fact a secret trustee, he will not be obliged to execute the agreement for the cestui que trust.(l) How far, in the case of an ordinary agreement for a lease, the intended lessor relies on the solvency of the intended lessee as a personal qualification, seems to be a point on which somewhat different views have been taken.(m)

§ 127. Again where, though the relation established by the contract may have in it nothing personal, some previous personal relation of favour, or otherwise, between the *contracting parties has been a material motive to the contract, it can be enforced by that person only, and not by a concealed cestui que trust or principal. This is illustrated by the case of *Phillips v. Duke of Buckingham*;(n) a negotiation had been entered into between the plaintiff and the duke for the purchase of an estate by the plaintiff, which had gone off; the plaintiff then got the secretary of Lord Chancellor Nottingham to enter into a negotiation on his behalf, but pretending it to be for the lord chancellor, or his son the solicitor-general: the duke had several cases depending in chancery, and, wishing to oblige the lord chancellor, entered into articles; but on discovering who was the real purchaser, refused to complete: according to the report in *Vernon*, the plaintiff's bill was dismissed, and the case is considered an authority for the principle established by such dismissal; for, though it appears that specific performance was ultimately granted, it seems to have been only on payment by the plaintiff of the full value of the estate, being a sum greater than that originally agreed on.(o) Lord Thurlow showed an inclination to disregard these personal motives, considering it to be immaterial in a contract for an annuity, that a defendant was in fact a trustee for the son of the plaintiff, with whom he had refused to deal.(p) But Lord Eldon expressed dissatisfaction with that decision; and it seems to be clearly established, that motives of kindness towards the trustee, or feelings of dislike to the concealed beneficiary, when known to the other party, may bar a specific performance at the suit of the person on whose behalf the ostensible principal contracted.(q)

§ 128. The same principle of course applies to *assignment: [*55] so, where an agreement for a lease was entered into by a lady with her son-in-law for his personal accommodation in the mansion-house and demesne lands, in the nature of a family transaction, the court refused specific performance at the suit of his assignees in bankruptcy.(r)

(k) *O'Herlihy v. Hedges*, 1 Sch. & Lef. 123.

(l) S. C.; per Sir W. Grant in *Featherstonagh v. Fenwick*, 17 Ves. 313.

(m) *Crosbie v. Tooke*, *Morgan v. Rhodes*, *Dowell v. Dew*, ante, § 123. See also *Stocker v. Dean*, 16 Beav. 161, where, from the personal nature of acts to be done, a right of pre-emption was held to be limited to the life of the person who had to do them.

(n) 1 Vern. 227. See also *Harding v. Cox*, 1 Vern. 227, n.

(o) See Raithby's note to the case in *Vernon*, 1 Sug. Vend. 349, n., 10th ed. See also *Scott v. Langstaffe*, cited *Lofft*, 797.

(p) *Lord Irnham v. Child*, 1 Bro. C. C. 92. See also *Jordan v. Sawkins*, 1 Ves. Jun. 402; *Fellowes v. Lord Gwydyr*, 1 R. & My. 83.

(q) *Bonnet v. Sadler*, 14 Ves. 528.

(r) *Flood v. Finlay*, 2 Ball & B. 9.

§ 129. (2) Where the agreement stipulates that the instrument to be executed in performance of it shall contain a proviso against assignment, this operates to prevent, not only an assignment of the interest when perfected, but also of the agreement to grant it.^(s) But the benefit of the proviso may of course be waived for the purposes of specific performance; as where the assignee of the intended lessee was recognized by the intended lessor as tenant.^(t)

§ 130. (3) The statute 32 Henry VIII., c. 9, which is entitled the bill of bracery and buying of titles, prohibits any person from selling or buying any pretended rights or titles to any lands, except the vendor has been in possession of the same, or of the reversion, or in receipt of the rents thereof for a year before the sale; but it provides that it shall be lawful for the person in possession to buy in any pretended title. In *Sharp v. Carter*,^(u) the bill alleging that Carter pretended some contract with a certain Evans, who claimed under a disputed will against the plaintiff, the heir-at-law, who was in possession, a plea of the statute was allowed to the discovery. In *Hitchens v. Landor*,^(v) a plea of this statute was allowed, on the ground that the plaintiff himself was only entitled under a contract for the purchase of the estate. But the case certainly appears to fall neither within the mischief nor the language of the statute, the sale being "not of a pretended right or title, but of the estate in fee simple in possession, subject certainly to the decision of a court of equity upon the right to a specific *performance."^(w) In a case^(x) before the Court of Common Pleas, A., the owner of a term, died [*56] in 1828, and B., his brother, who had previously been in possession of part of the premises, then took possession of the whole, and continued so until 1829, when he died, leaving all his interest in the property to C., who thereupon entered and remained in undisputed possession until 1841, when D., a brother of A., the original termor, took out administration to him, and sold his interest in the property, as such administrator, for £10: the transaction was held to be void both by the common law and under the statute.

§ 131. But a transfer of an expectancy is not within the mischief of the statute; for the sale of an expectancy is not an allegation of any present right or title, but of the possibility of one thereafter to exist.^(y)

§ 132. The principle on which the statute of Henry VIII. is founded, and which gives rise to the doctrines of champerty and maintenance, namely, that persons ought not to be allowed to come in for the mere purpose of litigating rights which others are not disposed to enforce, applies to render void some cases of assignment which are not strictly within the above statute. Thus, whilst it is clearly lawful to assign a right at the time undisputed, and if, from circumstances afterwards dis-

^(s) *Weatherall v. Geering*, 12 Ves. 504.

^(t) *Dowell v. Dew*, 1 Y. & C. C. C. 345.

^(u) 3 P. Wms. 375.

^(v) *G. Coop.* 34. See also *Wall v. Stubbs*, 1 Mad. 80; *S. C.* 2 V. & B. 354.

^(w) 2 Sug. Vend. 45, 10th edit.; per Lord Eldon in *Wood v. Griffith*, 2 Swan. 56.

^(x) *Doc. d. Williams v. Evans*, 1 C. B. 717. See also, per Montague, C. J., in *Partridge v. Strange*, *Plowd.* 88.

^(y) *Cook v. Field*, 15 Q. B. 460.

covered, a necessity arises for litigation against third parties, the assignee may maintain his bill in equity :^(z) yet it is as clearly against public policy to allow of the assignment of a mere naked right to file a bill.^(a) On this ground the court has refused its assistance *to enforce the performance of an agreement by a person out of possession, to grant a present lease to a party who is at the time apprised that he cannot obtain possession except by a suit.^(b)

§ 133. Upon principles of public policy it seems that contracts by which railway or public companies seek to devolve business, or delegate powers, with which they are entrusted, on persons to whom the legislature has not entrusted them, and on whom it has not attached the same responsibilities that it has on the companies, are incapable of being enforced by a court of equity.^(c)

§ 134. It must be added that, even where a concluded contract would be assignable, the benefit of an offer cannot, it seems, be transferred, by the person to whom it is made, to a third person. "In case of an offer by A. to sell to B., an acceptance of the offer by C. can establish no contract with A., there being no privity."^(d)

§ 135. Where a contract has been entered into for the sale of property, and that property is afterwards aliened or assigned, or contracted to be aliened or assigned, and the alienee or assignee has notice of the original contract, he is liable to its performance at the suit of the purchaser. "If," said Lord St. Leonards,^(e) "the contract is a binding one, it can be enforced against any party in whom is vested the legal and beneficial interest in the property." "If," said Lord Rosslyn,^(f) "he is purchaser with notice, he is liable to the same equity, stands in his place and is bound to do that which the person he represents would *be bound to do by the decree." This principle, which has been acted on in numerous cases,^(g) may be sufficiently illustrated by a case^(h) before Lord Nottingham. The Earl of Salisbury being lessee of a col-

^(z) Wilson v. Short, 6 Ha. 366.

^(a) Prosser v. Edmonds, 1 Y. & C. Ex. 481. With the distinction between this and the preceding case, compare the distinction between furnishing evidence for the recovery of property without a view to litigation, and furnishing evidence to maintain litigation, Sprye v. Porter, 7 Ell. & Bl. 58.

^(b) Bayly v. Tyrrell, 2 Ball & B. 358.

^(c) Johnson v. Shrewsbury and Birmingham Railway Company, 3 De G. M. & G. 914; Beman v. Rufford, 1 Sm. N. S. 550; S. C. 7 Rail. C. 48; Great Northern Railway Company v. Eastern Counties Railway Company, 9 Ha. 306.

^(d) Meynell v. Surtees, 3 Sm. & Gif. 101, 117.

^(e) In Saunders v. Cramer, 3 Dr. & W. 99.

^(f) In Taylor v. Stibbert, 2 Ves. Jun. 437.

^(g) Jackson's case, 5 Vin. Abr. 543, pl. 3; Howard v. Hopkins, 2 Atky. 371; Ford v. Compton, 2 Bro. C. C. 32, & Belt's n. 2; Jalabert v. Duke of Chandos, 1 Ed. 372; Brooke v. Hewitt, 3 Ves. 253; Knollys v. Alcock, 5 Ves. 648; Meux v. Maltby, 2 Sw. 277; Spence v. Hogg, (before the V. C. of England and Lord Cottenham,) 1 Coll. C. C. 225; Dowell v. Dew, 1 Y. & C. C. 345; Crofton v. Ormsby, 2 Sch. & Lef. 583; Potter v. Saunders, 6 Ha. 1; Hersey v. Giblett, 18 Beav. 174; Shaw v. Thackray, 1 Sm. & G. 537; Goodwin v. Fielding, 4 De G. M. & G. 90; and Dyas v. Cruise, 2 Jon. & Lat. 460, where an agreement for a lease was enforced against a provisional assignee in insolvency.

^(h) Finch v. Earl of Salisbury and Hawtrey, Finch, 212.

lege lease, made a sub-lease of certain coppice-land to the plaintiff for fourteen years, and covenanted to take a new lease from the college, and to renew the plaintiff's lease with an addition of three years more to it, or answer the want thereof in damages, for that the wood granted to the plaintiff by that lease was to be full fourteen years' growth before it could be cut: the earl renewed and assigned his lease to Hawtrey, who had notice of the earl's covenant with the plaintiff; and he was accordingly decreed to execute to the plaintiff a new lease with the additional three years, in pursuance of the earl's covenant. And where a person having a prior title gets in the subsequent estate which is affected by the contract, and has notice, he cannot protect himself from the performance of the contract by his elder title: thus, where an equitable mortgagor entered into an agreement for a lease, and then the mortgagee, whose mortgage was prior to the agreement, bought the estate with notice, he was held bound to specifically perform the agreement: (i) and again, where A., having only the equity of redemption, agreed to sell to B., and subsequently both A. and his mortgagee conveyed to C., who had notice of A.'s *contract with B.; B. might enforce specific performance [*59] against C.(k)

§ 136. This principle of notice, under somewhat peculiar circumstances, was applied by Lord Eldon in the case of *Mortlock v. Buller*: (l) there the plaintiff alleged that a contract had been entered into by trustees of a marriage-settlement, who had a power to sell with the consent of the husband and wife: after the bill was filed, the wife died, and the husband's estate for life and remainder in fee were brought together, and the legal power of sale in the trustees extinguished. But Lord Eldon said that, if the purchaser had entered into the contract with the approbation of the husband and wife as was required by the settlement, the contract bound the estate, and should be made good by those who took interests, if it could not, out of the power.

§ 137. The principle is not confined to contracts for sale, but applies equally to all agreements and covenants which bind the land in equity; for these may in all cases be enforced against any person into whose hands it may come with notice. It is on this principle that the court grants specific performance of covenants for perpetual renewal, (m) and all covenants permanently affecting the enjoyment of the land, which are enforced in equity against all subsequent purchasers with notice, whether they be or be not such as would run with the land in the hands of subsequent purchasers at law. (n)

§ 138. The court proceeds on the same principle in the case of covenants for further assurance: so, where a tenant in tail executes a deed for the benefit of his creditors with such a covenant, or a mortgage with a like covenant, and subsequently becomes bankrupt, and by the *operation of the bankruptcy laws the estate becomes vested in [*60] the assignees in fee simple, they may be compelled, in the one case, to

(i) *Smith v. Phillips*, 1 Ke. 694.

(k) *Lightfoot v. Heron*, 3 Y. & C. Ex. 586.

(l) 10 Ves. 292, 315.

(m) Per Lord Hardwicke, in *Furnival v. Crew*, 3 Atky. 87.

(n) *Tulk v. Moxhay*, 2 Ph. 774; *Cole v. Sims, Kay*, 56.

convey the estate in fee simple to the trustees of the deed, and in the other, to redeem the mortgage, or convey the fee to the mortgagee.(o)

§ 139. And so contracts to devise lands have been enforced against persons claiming them under the party contracting to make the will.(p)

§ 140. One particular species of assignment of a contract arises in the cases in which a railway or other public company has entered into an agreement, and subsequently becomes amalgamated with some other company: for by this process the liability under the contracts of the existing companies is transferred to the new body which arises out of their fusion.(q)

[*61]

*CHAPTER V.

OF THE LIABILITY OF COMPANIES FOR THE CONTRACTS OF THEIR PROMOTERS.

§ 141. ANOTHER very important exception to the general rule, as to parties to the contract alone being parties to the suit, is furnished by the doctrine introduced and acted on by Lord Cottenham, that a public company, after incorporation, may be sued for the specific performance of contracts entered into before the passing of its act by the promoters,—on the ground that the company stands in the place of the promoters, or, to use the language of Lord Jeffrey, in the Court of Session, that the fact of “a party having passed from the chrysalis to the butterfly state”(a) creates no difficulty in the enforcement of such a contract. The principle was first introduced by the case of *Edwards v. The Grand Junction Railway Company*:(b) there Mr. Moss, who was the agent of the promoters of a railway, entered into an agreement with the trustees of a public highway, whilst the railway bill was before parliament, by which Mr. Moss agreed that he would enter into an agreement to the effect of certain clauses which the trustees had been desirous to have inserted into the bill, and would get the same confirmed under the seal of the company

(o) *Edwards v. Applebee*, 2 Bro. C. C. 652. n.; *Pye v. Daubuz*, 3 Bro. C. C. 595; per Lord Thurlow in *Tourle v. Rand*, 2 Bro. C. C. 652.

(p) *Goymer v. Paddiston*, 2 Ventr. 353; S. C. as *Goilmere v. Battison*, 1 Vern. 48. And see further, as to agreements to make wills containing particular dispositions, *Lord Walpole v. Lord Orford*, 3 Ves. 402; *Jones v. Martin*, 5 Ves. 266, n.; *Fortescue v. Hennah*, 19 Ves. 67; *Needham v. Kirkman*, 3 B. & A. 531; *Needham v. Smith*, 4 Russ. 318; *Logan v. Wienholt*, 1 Cl. & Fin. 611; *Jones v. How*, 7 Ha. 267; S. S. 9 C. B. 1; *Barkworth v. Young*, 4 Drew, 1; *Eyre v. Menro*, 26 L. J. Ch. 757.

(q) *Stanley v. Chester and Birkenhead Railway Company*, 9 Sim. 264; S. C. 3 My. & Cr. 773; *Earl of Lindsey v. Great Northern Railway Company*, 10 Ha. 664, where the cases of amalgamation establishing this principle are discussed.

(a) *Caledonian and Dumbartonshire Junction Railway Co. v. the Magistrates of Helensburgh*, 2 M^tQ. 394.

(b) 1 My. & Cr. 650; S. C. 1 Rail. C. 173; before the V. C., 7 Sim. 337.

intended to be incorporated,—the agreement being expressed to be made on the understanding that the trustees should offer no opposition to the bill, *and that the agreement should be void on Mr. Moss's delivering to the trustees the engagement of the intended company [*62] to the same effect. The bill passed; the company proposed to make a road across the railway of a narrower width than that stipulated for by the clauses before-mentioned: on a bill filed by the trustees against the company, for a performance of the agreement, and an injunction, the company was held to be bound by the agreement entered into by the promoters before incorporation. “The question,” said Lord Cottenham, in delivering judgment,(c) “is not whether there be any binding contract at law, but whether this court will permit the company to use their powers under the act in direct opposition to the arrangement made with the trustees prior to the act, upon the faith of which they were permitted to obtain such powers. If the company and the projectors cannot be identified, still it is clear that the company have succeeded to, and are now in possession of, all that the projectors had before: they are entitled to all their rights, and subject to all their liabilities. If any one had individually projected such a scheme, and, in prosecution of it, had entered into arrangements, and then had sold and assigned all his interest in it to another, there would be no legal obligation between those who had dealt with the original projector and such purchaser; but in this court it would be otherwise. So here, as the company stand in the place of the projectors, they cannot repudiate arrangements into which such projectors had entered: they cannot exercise the powers given by parliament to such projectors, in their corporate capacity, and at the same time refuse to comply with those terms, upon the faith of which all opposition to their obtaining such powers was withheld.” The same principle was subsequently acted on by his lordship in the cases of *Stanley v. The Chester and Birkenhead Railway Company*,(d) *and *Lord Petre v. The Eastern Counties Railway Company*.(e) [*63]

§ 142. The conditions under which the doctrine in question is applicable, if they have not been narrowed by subsequent cases, have at least been more clearly defined than they were in the cases already referred to. These conditions seem to be, (1) that the company must have taken the benefit of the agreement: and (2) that the agreement must be for something warranted by the terms of the incorporation.

§ 143. First, the company itself, after incorporation, must have taken the benefit of the agreement. It is not enough that the opposition to the intended bill was withdrawn, as that is a consideration moving, not to the company, but to the promoters. There must be an adoption of the contract by the enjoyment of the consideration. Therefore, where a company was incorporated in consequence of the withdrawal of the plaintiff's opposition, but after that event they had not entered upon any of

(c) 1 My. & Cr. 672.

(d) 3 My. & Cr. 773; S. C. 1 Rail. C. 58; before the V. C., 9 Sim. 264.

(e) 1 Rail. C. 462. See also, per Lord Cottenham in *Greenhalgh v. Manchester and Birmingham Railway Co.*, 3 My. & Cr. 791; *Vauxhall Bridge Company v. Earl Spencer*, Jac. 64.

the land, or in anywise adopted the contract, except by fruitless negotiations, the master of the rolls refused specific performance of the contract, and declined to order the defendants to admit the validity of the contract in an action at law; (*f*) and his honor acted on the same principle in the case which shortly afterwards came before him, of *Preston v. The Liverpool, Manchester and Newcastle Railway Company.* (*g*) In the *Earl of Lindsay v. The Great Northern Railway Company,* (*h*) Vice-Chancellor Wood explained the principle of these cases in a way strongly supporting the condition above-stated. He considered that the cases did [*64] *not proceed on the principle of contract through the agency of the promoters, but on the principle that the court will not allow a body to exercise powers acquired by means of a previous contract and arrangement, without carrying that contract and arrangement into full effect. To this extent, the court acts negatively; but having once acquired jurisdiction, then its action is positive as well as negative, and therefore it will not merely restrain the doing of acts contrary to the agreement, but will enforce every portion of it. Lord Campbell also, in his judgment in *The Eastern Counties Railway Company v. Hawkes,* (*i*) supported the same view of Lord Cottenham's doctrine. But it must be added that Lord St. Leonards, from the observations he made in the last-mentioned case on *Gooday v. The Colchester Railway Company,* (*k*) appeared inclined to uphold that doctrine in its utmost generality, and to hold that the conduct of the directors, after the act, in relation to the execution of their powers, cannot absolve them from liability in respect of the benefit which they secured by the withdrawal of the opposition to the bill.

§ 144. The second condition, viz. that the agreement must be for something warranted by the terms of the incorporation, and which the company is therefore competent to perform under the powers of its act, is established and illustrated by the case of *The Caledonian and Dumbartonshire Junction Railway Company v. the Magistrates of Helensburgh,* (*l*) which came before the house of lords from the Court of Session in Scotland. The magistrates of Helensburgh had agreed with the promoters of the railway to afford the projected company certain facilities for the construction of the railway through the town, and to petition parliament in favour of the bill; and the promoters on their part agreed that the company should pay for the making of a quay and harbour, [*65] which the magistrates *were to apply to parliament for powers to make. Lord Chancellor Cranworth, after animadverting on the general principle introduced by Lord Cottenham, decided the case on the ground that, in the instances before that judge, the acts to be done were within the powers of the company when incorporated, whereas here the object of the arrangement was to apply the funds raised under legislative authority for the purpose of the railway to an object foreign

(*f*) *Gooday v. Colchester, etc., Railway Co.*, 17 Beav. 132; *Williams v. St. George's Harbour Company*, 3 Jur. N. S. 1014, (M. R.)

(*g*) 17 Beav. 115.

(*i*) 5 Ho. Lords, 356.

(*l*) 2 M'Q. 391.

(*h*) 10 Ha. 664.

(*k*) Id. 308.

from that of the railway, namely, the construction of a pier and harbour. Again, in *Preston v. The Liverpool, Manchester, and Newcastle-upon-Tyne Junction Railway Company*,^(m) Lord Cranworth held that an agreement to pay £5000 to a person for not opposing a bill in parliament would be *ultra vires* of a railway company when incorporated, and therefore that it could not be enforced against the company by reason of its having been entered into by the promoters.

§ 145. Not only have these conditions been imposed on the doctrine as laid down by Lord Cottenham, but grave doubts have been thrown on the very principles of his decisions by the Lord Chancellor Cranworth and Lord Brougham in the two last-cited cases. Thus, in the case already referred to of *The Caledonian and Dumbartonshire Junction Railway Company v. The Magistrates of Helensburgh*,⁽ⁿ⁾ Lord Cranworth in a written judgment which had before its delivery received the concurrence of Lord Brougham, though deciding the case upon the point before mentioned, fully considered the general principle in question, and disapproved of it. His lordship observed that the doctrine in question could be supported only on the assumption that the company when incorporated is in substance, though not in form, a body succeeding to the rights and coming into the place of the projectors; and then proceeded *to show that, in his judgment, it is such a body neither [*66] in form nor in substance. The body incorporated, he argued, is not confined to the projectors, and may even include none of them: the act of parliament when passed becomes the charter of the company, prescribing its duties and declaring its rights; and all persons becoming shareholders have a right to consider that they are entitled to all the benefits held out by the act, and liable to no obligation beyond those which are there indicated: that to permit other terms to be imposed on the shareholders behind the terms of incorporation, would lead to injury to the shareholders, and often to a fraud, or at least a surprise on the legislature; and that, to render special terms as to particular cases or person binding on the company, they ought to be the subject of special clauses in the Act, whereby the whole truth could be disclosed, and neither the legislature nor any person taking shares could complain. And in the case of *Preston v. The Liverpool, Manchester, and New-castle-upon-Tyne Junction Railway Company*,^(o) Lords Cranworth and Brougham expressed similar views of the doctrine, although the ground on which they dismissed the plaintiff's appeal was that the agreement was in itself conditional on the construction of the railway. In this state of the authorities, it is difficult to speak with certainty as to how far the doctrine in question is to be considered as law: on the one hand, it has been repeatedly acted on by Lord Cottenham, and appears to be adopted by Lords Campbell and St. Leonards; on the other hand, the principles

(m) 5 H. Lords, 605, 621. See also *Leominster Canal Company v. Shrewsbury and Hereford Railway Co.*, 3 K. & J. 654.

(n) 2 M^tQ. 391. See also *Williams v. St. George's Harbour Company*, 3 Jur. N. S. 1014, (M. R.)

(o) 5 H. Lords, 605, affirming the M. R.'s decision, 17 Beav. 115. See same case before Lord Cranworth, as V. C., 1 Sim. N. S. 586, as to which, see the case before the House of Lords.

upon which it rests have been criticised by Vice-Chancellor Wood, and been distinctly disapproved of by Lords Brougham and Cranworth, upon reasonings, to say the least, of the greatest weight and cogency.

[*67]

*CHAPTER VI.

OF AGENCY.

§ 146. THE cases which arise where the contract is made by agents require consideration, as sometimes affording an apparent exception to the rule that parties to the contract only can be parties to the suit.

§ 147. Where the agents contract ostensibly as such, and in the names of their principals, little difficulty can occur. The principals here are the proper parties to sue and be sued, and it is, in the absence of special circumstances, improper to make such an agent a party to the suit.(a)

§ 148. Where, on the other hand, the agents appear on the face of the agreement as principals, the case is different. The principle by which these cases are regulated is laid down with great clearness by Lord Wensleydale, in Higgins v. Senior.(b) "There is no doubt," said his lordship, "that where such an agreement is made, it is competent to show that one or both of the contracting parties were agents for other persons, and acted as such agents in making the contract, so as to give the benefit of the contract on the one hand to, and charge with liability on the other, the unnamed principals,—and this, whether the agreement be or be not required to be in writing by the Statute of Frauds: and [*68] this evidence in no way contradicts *the written agreement. It does not deny that it is binding on those whom, on the face of it, it purports to bind; but shows that it also binds another, by reason that the act of the agent, in signing the agreement in pursuance of his authority, is in law the act of the principal. But, on the other hand, to allow evidence to be given that the party who appears on the face of the instrument to be personally a contracting party, is not such, would be to allow parol evidence to contradict the written agreement; which cannot be done." The Statute of Frauds, as we shall subsequently see, does not require that the authority of the agent should be in writing where the agreement is required to be so.

§ 149. The proposition at which we have thus arrived, that a person appearing as principal may yet have contracted as agent for another, who may when disclosed sue or be sued as principal, is to be qualified by all those considerations as to the reliance of one party on the personal qualities of the other, which have been referred to in considering how far the benefit of a contract is assignable in equity.(c) Thus it appears clear

(a) King of Spain v. De Machado, 4 Russ. 225; Smith v. Clarke, 12 Ves. 477, 484.

(b) 8 M. & W. 844.

(c) See ante, § 126.

that if A. contract with B. for the performance of anything in which B. may be reasonably taken to have relied on A.'s personal character or qualities, A. cannot declare himself the agent of C. so as to place him in the same position as regards B. that A. held; and again, if A. were to contract with B. for the purchase from him of his estate, B. could not afterwards declare himself the agent for C.; for C., not having the estate, could not perform the contract. And it may, it seems, be laid down that in no case can a contracting party declare himself the agent of an unnamed principal, except where the contract, if really made by the contracting party, might have been assigned by him to the party suing as principal.

§ 150. In these cases the agent is not a necessary party *to [*69] the suit, (d) unless the agency be not proved, or there be special circumstances which may render it proper to make him a defendant; as where the agent claimed to have entered into the contract for his own benefit. (e)

§ 151. The question may sometimes arise, whether a party has, on the construction of the contract, entered into it as principal or as agent. The commissioners of woods and forests were by statute authorized to enter into contracts, but the estate remained in the crown: on a contract entered into by them under this authority, it was held on demurrer that they could not be sued for specific performance, but that the contract must be enforced in the ordinary way in the case of estates vested in the crown. (f)

§ 152. In the case of a contract by an agent as a principal, the agent may at law sue in his own name, without in any way joining the real principal: in equity, however, it appears clear that a suit cannot be maintained by the agent, unless his real principal be in some shape a party to the suit. (g)

§ 153. The principle already stated (h) that a person appearing on a contract as principal, though really an agent, is yet liable on the contract as principal, applies in cases of specific performance in equity as well as of damages at law. (i) In a recent case (k) where the contract was in the name of the agent, who contended that, being merely such, the bill should be dismissed as against him, Lord J. Turner, then vice-chancellor, said that "the signature of the agreement was sufficient to subject him to the liability of performing it." It would appear on principle, that if, at the *time the contract was signed, both A. and B. understood that A. was acting merely as agent for C., and B. were afterwards to sue A. for specific performance as principal, A. might allege the understanding between himself and B. at the time, and give parol evidence of it, and that, if the allegation was proved, it might fur-

(d) *Kingley v. Young*, Dan. Pr. 188.

(e) *Taylor v. Salmon*, 4 My. & Cr. 134. See also *Marshall v. Sladden*, 7 Ha. 428; *Lees v. Nuttall*, 1 R. & My. 53; *Nelthorpe v. Holgate*, 1 Coll. 203; ante, § 83.

(f) *Nurse v. Lord Seymour*, 13 Beav. 254.

(g) *Per Lord Lyndhurst in Small v. Attwood*, You. 457. (h) *Ante*, § 148.

(i) *Jones v. Littledale*, 6 A. & E. 486; *Magee v. Atkinson*, 2 M. & W. 440.

(k) *Chadwick v. Maden*, 9 Ha. 191.

nish a valid defence; though the circumstances supposed would of course furnish no defence at law,(l) unless by way of equitable plea. And in many cases it is obvious that a suit for specific performance against an agent alone would fail, from the incapacity of the agent to perform it.(m)

PART III. OF THE DEFENCES TO THE SUIT.

[*71]

*CHAPTER I.

OF THE INCAPACITY TO CONTRACT.

§ 154. The incapacity to contract, of either of the parties to an agreement, furnishes ground on which that party may resist the specific performance of the contract; and on the principle of mutuality, hereafter to be considered, it may also furnish a defence to the other party, though himself perfectly competent. The incapacity to contract, and the incapacity to execute a contract, are of course different questions: the one must be judged of at the time of the contract, the other when its performance is sought.

§ 155. The question as to the capacity of persons to contract, as raised in suits for specific performance, being for the most part identical with the question as discussed at common law or elsewhere, and having no peculiar relation to the jurisdiction of equity in specific performance, I propose only to refer to a few points of practical importance which may arise in suits of this nature.

§ 156. The peculiar doctrines of equity with relation to married women make it necessary to allude to their capacity to contract. The principle on which the court proceeds is, that if a married lady have not separate property, she cannot contract at all; and if she have, she can contract, but only in respect of that, and the remedy is only against it, represented [*72] by the trustees, and not *in personam* *against her.(a) “A feme covert,” said Lord Cottenham,(b) “is not competent to enter into contracts so as to give a personal remedy against her. Although she may become entitled to property for her separate use, she is no more capable of contracting than before; a personal contract would be within the incapacity under which a feme covert labours.”

(l) Higgins v. Senior, 8 M. & W. 834.

(m) See post, § 658 et seq.

(a) Francis v. Wigzell, 1 Mad. 258; Aylett v. Ashton, 1 My. & Cr. 105. See also Humphreys v. Hollis, Jac. 73. The case of Vansittart v. Vansittart, 4 K. & J. 62, decides that the power of a wife to contract with her husband is not confined to her separate property, but extends to other matters as to which she can be regarded for the purposes of the contract as a feme sole: so that a wife suing her husband for divorce on the ground of adultery and cruelty may contract with him to abandon her suit.

(b) 1 My. & Cr. 111, 112.

§ 157. In one case,(c) a married lady possessed of separate estate, and living separate from her husband, verbally contracted to take a leasehold house for a term: the agreement was reduced into writing, and signed by the lessor's agent, and handed to the lady; she retained it, but without executing it, or any counterpart of it, but in letters written by her referred to it as an agreement, and she entered into possession: in a suit by the lessor against her and her trustees to enforce payment of rent, as a charge on her separate estate, the vice-chancellor held that she would have been bound, if she had been a feme sole, and that, being married, she was bound to the extent of her separate estate.

§ 158. If a married woman has a power to be exercised in a specific way, and she affects to contract by an exercise of the power, but without the required formalities, there will, it seems, be no decree against her; for, except under these formalities, she has no power to contract, and the paper signed by her is as void as an agreement signed by a married woman.(d)

§ 159. In suits for the enforcement of contracts against the separate estates of married ladies, the proper parties are the lady herself, her husband, and the trustees of the separate property.(e)

*§ 160. It is to be added that, with regard to real estate, a [*73] married lady may, under the Act for the Abolition of Fines and Recoveries,(f) not only dispose of the land, but contract respecting it, if not so as to render herself liable to damages, yet so as to bind her estate of inheritance.(g)

§ 161. Lunatics are under an incapacity to contract, except during lucid intervals, during which times contracts entered into by them are as binding as if made by a person of perfectly sound mind.(h) Where a person who has entered into a contract is subsequently found lunatic from a date prior to the contract, it is competent for the other party to file his bill for specific performance, and obtain an issue to inquire whether the defendant was a lunatic at the time of the contract, and, if so, whether he had lucid intervals, and whether the contract was executed during a lucid interval :(i) or he may ask in the alternative, to have the contract either performed or discharged; and in the latter case the court will allow him, if vendor, to retain out of the deposit his costs, charges, and expenses.(k) In judging of the insanity of a party, courts of equity are governed by the same principles as courts of law.(l)

(c) *Gaston v. Frankum*, 2 De. G. & Sm. 561.

(d) *Martin v. Mitchell*, 2 J. & W. 413, 434.

(e) See *Hulme v. Tenant*, 1 Bro. C. C. 16; *Murray v. Barlee*, 3 My. & K. 209.

(f) 3 & 4 W. IV. c. 74.

(g) *Crofts v. Middleton*, 25 L. J. Ch. 513, before L. J. J., overruling S. C. 2 K. & J. 194.

(h) *Hall v. Warren*, 9 Ves. 605. As to the evidence required to prove a lucid interval, see *Attorney-General v. Parnther*, 3 Bro. C. C. 441; *Ex parte Holyland*, 11 Ves. 10. See also Ray's *Medical Jurisprudence and Insanity*, ch. 14.

(i) *Hall v. Warren*, ubi sup.

(k) *Frost v. Beavan*, 17 Jur. 369. As to setting aside a contract for the lunacy of a party, see *Neill v. Morley*, 9 Ves. 478.

(l) Per Lord Hardwicke in *Bennet v. Wade*, 2 Atky. 327; *Osmond v. Fitzroy*, 3 P. Wms. 129. See post, § 239.

§ 162. The subsequent lunacy of a party to a contract in nowise affects the rights of the other parties; (*m*) and the difficulties which formerly stood in the way of their remedies are now removed by the Trustee Act, 1850, and the Lunacy Regulation Act, 1853, s. 122.

[*§ 163.] *§ 163. In addition to the legal incapacities to contract, courts of equity consider trustees, guardians, agents, and other persons standing in a confidential relation to others to be incapable of contracting for the purchase of the property entrusted to them in behalf of the persons to whom they stand thus confidentially related, and, under many circumstances, of contracting with such persons; and this incapacity may, of course, be urged in a suit for specific performance. But, inasmuch as it depends on the general doctrines of the court with regard to each of these particular relations,—and questions of this sort are more often agitated in suits to set aside the impugned transaction, than in proceedings for specific performance,—it does not appear necessary to do more here than to allude to the subject generally. (*n*)

[*75]

*CHAPTER II.

OF THE NON-CONCLUSION OF THE CONTRACT.

§ 164. No proceedings in specific performance can of course be had, unless it be shown that a contract has actually been concluded: if the arrangement come to was in its nature merely honorary, or if the matter still rests in treaty, no specific performance can be granted.

§ 165. Where the contract is embodied in a formal document simultaneously entered into by both parties, little difficulty can occur as to whether the contract was concluded. But this question frequently arises where a contract is alleged to have been constituted by the negotiations of the parties. If it be only doubtful whether the contract was concluded or still remained open, the court will refuse specific performance, and leave the parties to their rights at law. (*a*)

§ 166. A binding contract, enforceable in equity, may be constituted by the proposal of one party and the acceptance of the other. (*b*) But as the proposal has no validity without the acceptance, a memorandum of offer differs essentially from a memorandum of agreement. “In the case of an offer, no doubt, the party signing it may at any time before acceptance retract; but if it be an agreement, *though signed by one party alone, he cannot retract at his pleasure, but all he can do is to call upon the other party to sign or rescind the agreement. A memorandum of agreement supposes that the two parties have verbally

(*m*) *Owen v. Davies*, 1 Ves. Sen. 82. (*n*) As to Infancy, see post, § 287.
 (*a*) *Huddleston v. Briscoe*, 11 Ves. 583, 591; *Stratford v. Bosworth*, 2 V. & B. 341.

(*b*) The acceptance must be by the other party. An offer by A. to B. and acceptance by C. constitutes no contract. *Meynell v. Surtees*, 3 Sm. & Gif. 101, 117.

made an actual contract with each other; and when the terms of such contract are reduced into writing and signed, that is sufficient to bind the party signing: but if the memorandum is of an offer only, that assumes that there has been no actual contract between the parties.”(c)

§ 167. In order that an acceptance may be operative, it must be unequivocal, unconditional, and without variance of any sort between it and the proposal, and it must be communicated to the other party without unreasonable delay.

§ 168. The proposition that the acceptance must be unequivocal, unconditional, and without variance, is supported and illustrated by a great variety of decisions. In the case of Kenuedy v. Lee,(d) the subject was much discussed: it was there unsuccessfully argued that the acceptance introduced a term respecting the goodwill of a business not included in the proposal.

§ 169. The unequivocal character of the acceptance that is requisite is well illustrated by a case(e) in which A. made an offer to B., by letter, to sell a lot of land; B. filed a bill against A., alleging an agreement in writing for the sale of this estate, and the answer offered to sell the estate; the decree was in the alternative for a conveyance on the payment of the purchase-money into the bank, or, in default, for the dismissal of the bill: the money was paid. The question arose between the heirs and devisees of B., as *to the time when the contract became binding: it was held that the bill did not amount to an acceptance so as to bind B.; for he, as plaintiff, might have dismissed his bill: the decree did not, for it left an election to the plaintiff; but the payment of the money into the bank did, for that was unequivocal. And in a recent case,(f) where the plaintiff had made an offer to take a farm, and had referred to certain persons as to his capabilities and capital, and in consequence of this offer the agents of the proposed lessor had, by his direction, prepared and sent to the proposed lessee a lease which they considered to be in pursuance of the proposal, Kindersley, V. C., held this not to be an acceptance, on the ground that the act was ambiguous and conditional:—ambiguous, because the lease might have been sent in order to save time, and without any intention of departing from the right of accepting or refusing the offer of the plaintiff, according to the result of his communication with the referees; and conditional, because the sending the draft lease, if an acceptance at all, was an acceptance upon condition that the defendant accepted the draft lease. The case of Thomas v. Blackman,(g) before Knight Bruce, V. C., may also be referred to as illustrating this doctrine. Here there had been a long correspondence, and the vice-chancellor held that there never had been, in any part of it, a clear

(c) Per Kindersley, V. C., in Warner v. Willington, 3 Drew, 531. See also Meynell v. Surtees, 1 Jur. N. S. 737; Horsfall v. Garnett, Week. Rep. 1857-1858, 387, (Wood, V. C.) The distinction is the same between a *pollicitatio* and a contract in the Roman law. See Pothier, *Traité des Oblig.* par. 1, chap. 1, s. 1, art. 1, § 2.

(d) 3 Mer. 441; Thornbury v. Bevill, 1 Y. & C. C. C. 554.

(e) Gaskarth v. Lord Lowther, 12 Ves. 107.

(f) Warner v. Willington, 3 Drew, 523. See also Horsfall v. Garnett, Week. Rep. 1857-1858, 387, (Wood, V. C.)

(g) 1 Coll. C. C. 301.

accession on both sides to one and the same set of terms; and accordingly he decreed the dismissal of the bill, unless the plaintiff accepted the terms of the defendant's original offer, which the plaintiff acceded to.

§ 170. Where there is any variance between the terms of the proposal and those of the acceptance, no contract arises; as where A. offered to purchase a house on certain terms, possession to be given on or before [*78] the 25th of *July, and B. agreed to the terms, and said he would give possession on the 1st of August.(h)

§ 171. And where A. made the promoters of a railway an offer of a way-leave for the purpose of their railway, which was one for mineral traffic only, and it was subsequently accepted, but for the purpose of constructing a public railway for general traffic, this was held to be such a variation in the subject-matter as prevented any contract from arising.(i)

§ 172. The introduction of a term in the acceptance, which is not in the proposal, is a variance which prevents their constituting a contract. Therefore, where the defendant offered certain terms for a lease, and the plaintiff accepted the terms and offered an under-lease, there was held to be no contract.(k) So where a condition was introduced into the acceptance, it prevented its operating as a contract.(l) In another case, where the plaintiff proposed an agreement to the defendant, stipulating, amongst other things, that a lease should contain all the covenants in the superior lease, and the defendant signed the agreement tendered, but with the qualification that there was nothing unusual in such superior lease; a draft of the proposed lease was then submitted to the defendant, who made some alterations, and requested the plaintiff's solicitors to adopt them at once, or to refuse the lease; the solicitors sent back the draft, acceding to all the alterations except one as to assigning without license: it was held that at this stage there was no contract, and that the proposed lessee could determine the treaty.(m) And where a proposal was made to take an allotment of railway shares, and a letter was returned, accepting the offer, but headed "not transferable," the new term introduced [*79] by these words prevented *the proposal and acceptance from constituting a contract.(n)

§ 173. But where the proposal leaves a term to be decided by the acceptance, the decision of this will not, of course, amount to the introduction of a new term; as, e. g., where the proposal has reference to such a day as shall be named by the party to whom it is made, and he, in accepting, names the day.(o) And a contract by proposal and acceptance may, like any other, leave the price or any other term to be ascertained in a way agreed on.(p)

§ 174. So, again, it seems clear that a variation which is purely nuga-

(h) Routledge v. Grant, 4 Bing. 653.

(i) Meynell v. Surtees, 3 Sm. & Gif. 101, affirmed by Lord Chancellor, 1 Jur. N. S. 737, sanctioning this argument.

(k) Holland v. Eyre, 2 S. & S. 194.

(l) Hall v. Hall, 12 Beav. 414.

(m) Lucas v. James, 7 Hare, 410.

(n) Duke v. Andrews, 2 Exch. 290.

(o) Boys v. Ayerst, 6 Mad. 316.

(p) Walker v. Eastern Counties Railway Company, 6 Ha. 594.

tory will not affect the contract;(*q*) nor will the introduction, into the acceptance, of what is not matter of contract; as, e. g., the words "we hope to give you possession at half-quarter day," which were held to be a mere expression of hope, and so not to introduce a new term into the acceptance.(*r*)

§ 175. Nor will the court consider a new term to be introduced by the circumstance that the acceptance proceeds to treat of the way in which the contract is to be carried out; as, for instance, by referring to a formal agreement that was to be drawn.(*s*)

§ 176. The acceptance, moreover, must be without unreasonable delay. "When I offer anything to a person," said Lord Cranworth,(*t*) "what I mean is, I will do that if you choose to assent to it; meaning, although it is not so expressed, if you choose to assent to it in a reasonable time." This principle is illustrated by the case of *Williams v. Williams*,(*u*) of which the circumstances were, that in *1827, A. wrote to B. that he had credited B.'s account with £220 in consideration of an [*80] agreement by B. to convey certain houses. The abstract was delivered; but there was no acceptance in writing by B., who, however, five years afterwards, filed his bill against A. for specific performance. It appeared that in 1827, A. had abandoned the treaty, and that in 1829 both parties considered it as broken off, but nevertheless, that B. had in the meantime had the benefit of the credit of £220. The court dismissed the bill, on the ground that an offer to convert it into a contract must be accepted and acted on within a reasonable space of time.

§ 177. The proposal, before conversion into a contract by acceptance, may be determined in two ways,—by the withdrawal of the person making the offer, or the refusal of the person to whom it is made. First, it may be determined by the proposer by withdrawal before acceptance,(*v*) because the proposal by itself creates no mutuality and no obligation; so that where a person made offers for a farm, which the owner intended to accept, but did not do so bindingly, and the proposer subsequently withdrew his offer, it was held that he could do so, and that there was no contract.(*w*)

§ 178. This right to retract is not affected by the fact that the offer itself specifies a time within which the acceptance is to be made; so that where A. offered to sell a house to B., and gave B. six weeks for a definite answer, A. was held entitled to withdraw his offer before the expiration of that period.(*x*)

§ 179. In the second place, the refusal of the person to whom the

(*q*) *Lucas v. James*, 7 *Ha.* 410, 424; cf. post, § 419.

(*r*) *Clive v. Beaumont*, 1 *De G. & Sm.* 397. See also *Johnson v. King*, 2 *Bing.* 270.

(*s*) *Gibbins v. North-eastern Metropolitan District Asylum*, 11 *Beav.* 1; *Skinner v. M'Donall*, 2 *De G. & Sm.* 265; and see post, § 344.

(*t*) In *Meynell v. Surtees*, 1 *Jur. N. S.* 737. (*u*) 17 *Beav.* 213.

(*v*) *Thornbury v. Bevill*, 1 *Y. & C. C. C.* 554. See also *Meynell v. Surtees*, 1 *Jur. N. S.* 737, (L. C.)

(*w*) *Warner v. Willington*, 3 *Drew*, 523.

(*x*) *Routledge v. Grant*, 4 *Bing.* 653; *Cooke v. Oxley*, 3 *T. R.* 653.

proposal is made puts an end to it; and it will not be revived by a subsequent tender of acceptance.(y)

[*§ 180.] As it is competent to the proposer to recall his proposal at any time before acceptance, so also he may vary it by the introduction of any new term into it. And as the person to whom the proposal is made may, of course, offer to accept the terms proposed, with any variation or addition, it follows that each party may continue to add fresh stipulations to the proposed contract, until the terms proposed by one side have been definitely accepted by the other.(z) Therefore where the owner of an estate made a proposal requiring, amongst other things, the payment of £1,500 by way of deposit, the purchaser objected to it, and before he accepted the terms, the owner required it to be paid and the agreement to be signed before a given day, or the treaty to be at an end, and this was not complied with, but a subsequent offer was made to sign the agreement and pay the deposit; the court held that there was no contract.(a)

§ 181. It being sufficient to satisfy the Statute of Frauds that the writing be signed by the party to be charged,(b) it follows that a proposal in writing, where simple assent is required and the acceptance is not to supply any term,(c) may be so accepted as to constitute a contract binding on the proposer by other means than a written acceptance.

§ 182. (1) Thus it seems that an acceptance by parol is sufficient, as was recently held by Vice-Chancellor Kindersley,(d) in a case in which he observed on the want of previous authority distinctly to establish the point. In *Coleman v. Upcot*,(e) where there was first an acceptance by the plaintiff by parol, and subsequently a subscription by the plaintiff, the parol acceptance appears to be the ground of the decision that there was a binding contract.

[*§ 183.] (2) So, generally speaking, where the proposal comes from the defendant, the acceptance need not be proved by the plaintiff, the filing of the bill being *prima facie* evidence of its acceptance, liable to be repelled by proof, on the part of the defendant, of the proposal having been previously determined.(f)

§ 184. (3) On a like principle the acceptance of a proposal may be by acts, so as to bind the person making the proposal. Thus, for example, where an uncle of a young man sent proposals to the friends of the lady, to which no answer was returned, but the young man was admitted as a suitor, and the marriage ensued, it was held by Lord Nottingham to amount to a complete agreement, which ought to be performed on all sides.(g) The principle is also established by the cases hereafter consi-

(y) *Hyde v. Wrench*, 3 Beav. 334. The decision in *Hodgson v. Hutchenson*, 5 Vin. Abr. 522, pl. 34, which inferred an acceptance from acts after an explicit refusal, cannot probably be maintained on this point.

(z) *Honeyman v. Marryat*, 21 Beav. 14, affirmed in D.P., 6 Ho. Lords, 112.

(a) S. C.

(b) See post, § 346.

(c) *Boys v. Ayerst*, 6 Mad. 316.

(d) *Warner v. Willington*, 3 Drew, 523. See accordingly, *Smith v. Neale*, 26 B., N. S. 67, 88.

(e) 5 Vin. Abr. 527, pl. 17; cf. *Palmer v. Scott*, 1 R. & My. 391.

(f) *Boys v. Ayerst*, 6 Mad. 316. (g) *Parker v. Serjeant, Finch*, 146.

dered, of representations made by one person, and acts done by another on the faith of those representations.(h)

§ 185. In contracts constituted by proposal and acceptance, it is obvious that the question may arise, at what time the treaty was converted into a contract. The contract is perfected by the posting of a letter declaring the acceptance, because thereby the acceptor has done all that is requisite on his part, and is not answerable for the casualties of the post-office.(i) Hence it follows that the contract dates from the posting and not from the receipt of the letter of acceptance.(k) In case of there being an agent for the proposer, the communication of the acceptance to him completes the contract, though the agent may fail to make known the acceptance to his principal (l)

§ 186. One common form of agreement in the nature of *a proposal and acceptance is where there is on the one part an [*83] agreement to do a certain act on demand, and on the other part that demand has been made.(m)

§ 187. Another species of contract by proposal and acceptance is constituted by a promise or representation made by one person, and acts done by another person on the faith of such promise or representation. "A representation," said Lord Cottenham,(n) "made by one party for the purpose of influencing the conduct of the other party, and acted on by him, will in general be sufficient to entitle him to the assistance of this court for the purpose of realizing such representation."

§ 188. Representations are of two kinds: the one, of things past or present, the other, of things future: the one, of things done or existing, the other, of things to be done. With regard to the former class, whenever a representation as to something alleged as a then existing fact, which representation is not true, has been made by a person who knows it to be untrue, or does not know it to be true,(o) to another person in order to induce him to an act, and that act has been thereupon done by the second person to his prejudice, the person making the representation will not be allowed either in equity or at law afterwards to turn round and deny the alleged fact: "It shall be," said Lord Mansfield,(p) "as represented to be." Thus for example, where one person represented to another, on a treaty for marriage with his daughter, that a certain demand was not existing, he was afterwards restrained by the court from proceeding to recover the demand :(q) and where, in a recent case, a father repre-

(h) See post, § 187 et seq. See also Hodgson v. Hutchenson, 5 Vin. Abr. 522, pl. 34, where acts were held to amount to an acceptance after an explicit refusal: as to which, see ante, § 179.

(i) Dunlop v. Higgins, 1 Ho. Lords, 381; Duncan v. Topham, 8 C. B. 225; Adams v. Lindsell, 1 B. & A. 681; Stocken v. Collin, 7 M. & W. 515.

(k) Potter v. Saunders, 6 Ha. 1. (l) Wright v. Bigg, 15 Beav. 592.

(m) Beatson v. Nicholson, 6 Jur. 620.

(n) In Hammersley v. Du Biel, 12 Cl. & Fin. 62, n.; cf. Ayliffe v. Tracy, 2 P. Wms. 64, which shows that where the act was not done in reliance on the representation, no contract arises.

(o) Per Sir Wm. Grant in Ainslie v. Medlycott, 9 Ves. 21.

(p) In Montefiori v. Montefiori, 1 Wm. Black. 364.

(q) Neville v. Wilkinson, 1 Bro. C. C. 543. See also Gale v. Lindo, 1 Vern. 475; Scott v. Scott, 1 Cox, 366, and at law. Montefiori v. Montefiori, 1 Wm. Bl. 363; Pickard v. Scars, 6 A. 469; Gregg v. Wells, 10 A. & E. 90; Freeman v.

[*84] sented *to a future husband of his daughter, that she was entitled after the death of her parents to £10,000, and she was in fact only entitled to about half that amount, the balance was recovered from the father's estate.(r) But in these cases, the court acts merely on the principle of preventing fraud, and not at all on contract;(s) and they therefore do not properly come in for discussion here.

§ 189. But with regard to representations of something future, and within the power of the party making the statement, the case is different; for such a representation, made for a particular purpose by one person, and followed by conduct in pursuance of it by the other, constitutes a true and proper contract. "There is no middle term," said Lord Cranworth,(t) "no *tertium quid* between a representation so made to be effective for such a purpose and a contract; they are identical."

§ 190. In order to enable the court to give relief on the ground of contract, to a person having acted on the faith of another's statements, the representation or promise on which he relies must be clear and absolute. Therefore where a father, after declining to enter into a settlement, added that he should allow his daughter the interest of £2,000, and that if she married he might bind himself to do it, and pay the principle at his decease, it was held not to be an absolute agreement.(u)

§ 191. Where the representation is merely of what the party intends to do, or the promise is one for the performance *of which the [*85] person making it refuses to contraet, and insists that the recipient shall rely on his honour, the engagement is of a merely honorary nature, and therefore not enforceable by the court.(v) In one case the guardians of a young lady, who was a minor, objected to her marriage until a suitable settlement should be made on behalf of her intended husband: his uncle, from whom he had expectations, having been previously consulted on the matter, was informed of this resolution; in reply to which he wrote to his nephew, "My sentiments respecting you continue unalterable: however, I shall never settle any part of my property out of my power so long as I exist. My will has been made for some time, and I am confident that I shall never alter it to your disadvantage. I repeat that my Tipperary estate will come to you at my death, unless some unforeseen occurrence should take place." The letter further alleged that, as he had never settled anything on any of his nephews, his doing so in this case would cause jealousy in the family: this letter the writer desired might be communicated to the young lady's guardians. It was held that the intention of the uncle was not to settle his property, and that therefore the letter could not be treated as a contract.(w)

Cooke, 2 Exch. 654; Howard v. Hudson, 2 Ell. & Bl. 1; Foster v. Mentor Life Assurance Company, 3 Ell. & Bl. 48.

(r) Bold v. Hutchinson, 20 Beav. 250, affirmed 5 De G. M. & G. 558, on different grounds. See also Jameson v. Stein, 21 Beav. 5.

(s) Per Lord Cranworth in Money v. Jorden, 2 De G. M. & G. 332.

(t) In Maunsell v. White, 4 Ho. Lords, 1056.

(u) Randall v. Morgan, 12 Ves. 67. See the observations on this case, of Lord St. Leonards in Maunsell v. White, 1 Jon. & L. 567.

(v) Cf. Lord Walpole v. Lord Orford, 3 Ves. 402; *infra*, § 393.

(w) Maunsell v. White, 1 Jon. & L. 539, affirmed 4 Ho. Lords, 1039.

§ 192. The same principle governed the decision of the case of *Money v. Jorden* :^(x) the facts of the case were, shortly, that B. was under a bond for the payment of a sum of money to A. ; that B. being about to marry, A. said she should never distress him about the bond, that she had given it up, and would never enforce it : but on being requested to give up the bond, she declined to do so, saying that she would be trusted, and that B. might rely on her word. B. married, and A. subsequently having put the bond in suit, *B. sought the interference of the court by injunction. The representations in question were held [*86] to be binding by the master of the rolls in the first instance, by Lord Justice Knight Bruce on appeal to the lords justices, and by Lord St. Leonards in the house of lords, whilst the contrary was ultimately decided by a majority in the house, consisting of Lords Cranworth and Brougham. The question was in a considerable part one of evidence. But Lords Cranworth and St. Leonards differed as to the effect of a representation of intention, the latter holding such to be binding, and the former not.^(y)

§ 193. On the same principle it was that where a settlement was not ready at the time of the marriage, and the lady married on the husband's engagement in honour that she should have the same advantage of the agreement, as if it were in writing and duly executed, the court refused to interfere, as the engagement was merely honorary.^(z) And again, where letters were sent containing what only amounted to a general assurance that, if a tenant acted to the satisfaction of his landlord, he would deal honourably and handsomely with him in regard to renewing his lease, this assurance was discriminated from a matter of contract, and was not enforced by the court.^(a)

§ 194. The circumstances of the case of *Morehouse v. Colvin*^(b) were these. A testator, who had by his will bequeathed £12,500 to his daughter, wrote a letter to an old friend of his in India, to whom the young lady was consigned, and therein stated that, in case of her marrying with his approbation, her husband should have £2000 on the marriage, and continued, "nor will that be all : she is and shall be noticed in my will ; but to what further *amount I cannot precisely say, owing to the present reduced and reducing state of interest, which puts it out [*87] of my power to determine at present what I may have to dispose of." The substance of these terms was communicated to the intended husband : the testator revoked his will, and made another, omitting the legacy, and giving his daughter a residuary and contingent interest : the master of the rolls, and afterwards the lords justices, held that there was no contract which could be enforced.

195. We will now proceed to consider the cases in which a representation, followed by conduct of the party to whom it is made, has been held to be binding.

(x) 15 Beav. 372 ; 2 De G. M. & G. 318 ; 5 Ho. Lords, 185.

(y) With regard to the force of an expression of intention, see, besides the cases above stated, *Norton v. Wood*, 1 R. & My. 178 ; *Cross v. Sprigg*, 6 Ha. 553, and *infra*, §§ 200, 202.

(z) *Viscountess Montacute v. Maxwell*, 1 P. Wms. 618.

(a) *Price v. Asheton*, 1 Y. & C. Ex. 441.

(b) 15 Beav. 341.

§ 196. These cases have, for the most part, turned upon representations made in the course of marriage treaties, followed by marriage made on the faith of such representations,—a class of cases in which the court is inclined to attach more than ordinary weight to the language of the one party, when it is calculated to convey a false impression to the other.(c)

§ 197. Where the proposal is in writing, the marriage and other acts are relied on only as evidence of acceptance ; but where the proposal has been verbal, the acts must be relied on also as constituting a case of part-performance, with regard to which marriage alone is from the words of the Statute of Frauds, not sufficient. The cases on part-performance in connection with such agreements,(d) and also of marriage in fraud of a parol agreement,(e) are respectively considered elsewhere.

§ 198. The principle of the cases now under discussion is established by several old decisions, to which it will be sufficient to refer,(f) before considering the more recent cases.

[*88] *§ 199. In *Luders v. Anstey*,(g) a husband before marriage wrote a letter proposing a settlement of the lady's fortune, securing certain benefits to the children of the lady's first marriage : shortly after, the marriage took place, and Lord Loughborough held that the husband was bound by the letter, though bonds to execute a settlement had subsequently been entered into, also securing benefits, but different ones, to the said children. "There is no *locus paenitentiae*," said his lordship, "in this case ; and I should require a positive distinct dissent : and that could not be evidenced by anything but an actual settlement before marriage, varying from that."

§ 200. In *Saunders v. Cramer*,(h) a paper signed by a lady, expressing her intention of leaving her granddaughter a certain sum, to be secured by a bond, which offer was to be, and was in fact communicated to the intended husband of the young lady, and was followed by a marriage, was held a binding proposal. The mention of the bond went to show that it was intended to be binding on the party making it.

§ 201. In *Montgomery v. Reilly*,(i) the eldest son came into estates, subject to a jointure to his mother, and portions to his brothers and sisters, and carried on a correspondence with a friend of the family with a view to the increase of these charges, and ordered the payment of the increased jointure and interest on the increased portions : on the faith of a representation made on the strength of these acts by the family friend, a daughter married : the interest on the increased portion was continued to be paid to the daughter, and the agent's accounts in which these payments were stated passed ; and the eldest son took possession [*89] of some property under the arrangement with his brothers and sisters, to which he would not otherwise *have been entitled.

(c) Per Lord St. Leonards in *Maunsell v. White*, 1 Jon. & L. 563.

(d) See *infra*, § 408.

(e) See *infra*, § 380.

(f) *Moore v. Hart*, 1 Vern. 110, 201; *Wankford v. Fotherley*, 2 Vern. 322; *Halfpenny v. Ballet*, 2 Vern. 373; *Cookes v. Mascall*, 2 Vern. 200.

(g) 4 Ves. 501; S. C. 5 Ves. 213.

(h) 3 Dr. & W. 87.

(i) 1 Bl. N. S. 364; S. C. 1 Dow, N. S. 62.

The house of lords decided that there was a contract binding on the eldest brother, and specifically enforced it.

§ 202. In *Du Biel v. Thompson*,^(k) in written proposals made on the marriage treaty, the father expressed that he "intended to leave his daughter a further sum of £10,000 in his will, to be settled on her and her children, the disposition of which, supposing she had no children, to be prescribed by the will of her father." This was held to create an obligation. These proposals were made subject to revision; but it was held that that power was determined by their acceptance by the intended husband, and the marriage with the father's consent. This decision of Lord Langdale was affirmed by Lord Cottenham,^(l) and afterwards by the house of lords.^(m)

*CHAPTER III.

[*90]

OF THE INCOMPLETENESS OF THE CONTRACT.

§ 203. "NOTHING is more established in this court," said Lord Hardwicke,^(a) speaking of contracts which the court will enforce, "than that every agreement of this kind ought to be certain, fair, and just in all its parts. If any of those ingredients are wanting in the case, this court will not decree a specific performance." "I lay it down as a general proposition," said Lord Rosslyn,^(b) "to which I know no limitation, that all agreements, in order to be executed in this court, must be certain and defined: secondly, they must be equal and fair; for this court, unless they are fair, will not execute them: and thirdly, they must be proved in such manner as the law requires."

§ 204. In regard to objections founded on the want of any of these qualities in the contract, or on the incapacity of the court to perform the contract, or its illegality, the court is, from obvious motives of justice, somewhat unwilling to entertain the objection, when it is made after part-performance, from which the defendant has derived benefits, and the plaintiff cannot be fully recompensed except by the performance of the agreement in specie.^(c)

§ 205. The qualities of completeness, certainty, and fairness, which will now be considered, will in great part, be best explained by showing cases in which they have been considered as being wanting. [*91] The qualities of completeness and certainty are not perhaps truly separable; but under the former I shall rather consider those cases where there is the absolute want of some term in the contract; under

(k) 3 Beav. 469.

(l) 12 Cl. & Fin. 61, n.

(m) 12 Cl. & Fin. 46, s. n., *Hammersley v. Du Biel*.

(a) In *Buxton v. Lister*, 3 Atky. 386. See *infra*, § 342.

(b) In *Lord Walpole v. Lord Orford*, 3 Ves. 420; accordingly, *Underwood v. Hithcox*, 1 Ves. Sen. 279; *Franks v. Martin*, 1 Ed. 309.

(c) See § 54 and § 309.

the latter head of certainty, those where it is not the entire want of the term, but the want of sufficient exactitude in it, which has furnished a defence to a specific performance.(d)

§ 206. The time at which the completeness of the contract is to be ascertained is the filing of the bill : so that it was not sufficient for the purpose of obtaining an immediate decree, to prove that the consent of a tenant for life, which was essential to the contract, was given before the hearing.(e) It is an obvious principle of justice, that the adoption of a contract by a third party shall not so relate back as to subject a party to legal proceedings in respect of its non-performance, the non-performance having at the time been justifiable.(f)

§ 207. To this principle there are some exceptions, or apparent exceptions, which it is well briefly to notice. (1.) When the contract is incomplete through the default of the defendant, and the incompleteness is one which can be remedied, the court will not refuse its aid : thus, where an agreement had been entered into for granting an annuity for three lives, to be named, and the consideration had been paid, but, through the defendant's refusing to proceed, the lives had not been named, the plaintiff was allowed to perfect his contract by nominating three lives who were in being at the time of the contract.(g) (2.) A bill may be [*92] *maintained on a contract where, though some term be not ascertained, the court has the means of ascertaining it, on the principle of the maxim *id certum est quod certum reddi potest*. Thus, in a contract for the sale of lands under the Lands Clauses Consolidation Act, in which the sum was not ascertained, the court decreed the defendants to issue their warrant to the sheriff to summon a jury to settle the compensation : (h) and the same principle is illustrated by the cases on the requisite completeness as to subject-matter and price.(i)

§ 208. The necessary completeness of the contract may be considered in respect of (1) the subject-matter, (2) the parties to the contract, (3) the price, and (4) the terms.

§ 209. Every valid contract must contain a description of the subject-matter : but it is not necessary that it should be so described as to admit of no doubt what it is ; for the identity of the actual thing and the thing described may be shown by extrinsic evidence. This flows from the very necessity of the case ; for all actual things being outside of and beyond the agreement, the connection between the words expressing the agreement and things outside it must be established by something other than the agreement itself, that is, by extrinsic evidence : the same rule is admitted, and from the like necessity, with regard both to persons and things mentioned in wills ;(k) and in the cases of agreements within both

(d) See also the cases stated infra, § 342.

(e) Adams v. Brooke, 1 Y. & C. C. 627.

(f) Right v. Cuthell, 5 East, 491; Doe d. Mann v. Walters, 10 B. & C. 626; Doe d. Lyster v. Goldwin, 2 Q. B. 143.

(g) Pritchard v. Ovey, 1 J. & W. 396; Lord Kensington v. Phillips, 3 Dow, 61.

(h) Walker v. Eastern Counties Railway Company, 6 Ha. 594; but see, as to this case, § 21. See also Owen v. Thomas, 3 My. & K. 353; Monro v. Taylor, 8 Ha. 51. (i) Post, § 212, 214.

(k) See the observations of Lord Cranworth in Clayton v. Lord Nugent, 13 M. & W. 207.

the fourth and seventeenth sections of the Statute of Frauds, parol evidence as to identity is admissible.(l) Thus, for instance, the expression, "Mr. Ogilvie's house," was held sufficient, and extrinsic evidence was admitted to show what house it referred to.(m) *So, where an agreement referred to another writing, parol evidence of the [*93] identity of a certain writing with that referred to was admitted;(n) and in a recent case parol evidence was admitted to show the meaning of "£50 more of premium," and of "the profit rent of the present tenant."(o)

§ 210. Where it is necessary to call in extrinsic evidence, the connection of the subject-matter of the agreement, and the thing in respect of which specific performance is sought, must be alleged in the bill, and supported by sufficient proof.(p)

§ 211. It is, however, essential that the description of the subject-matter should be so definite, as that it may be known with certainty what the purchaser imagined himself to be contracting for,(q) and that the court may be able to ascertain what it is.(r) And so in a recent case,(s) where there was an agreement for the letting of "coals, etc.," the statement of the subject-matter was thought by K. Bruce, L. J., insufficient, and specific performance refused on that amongst other grounds.

§ 212. With regard to the description of the subject-matter, the maxim *id certum est quod certum reddi potest* applies. Thus, where the memorandum of the agreement contained no specific description of the property sold, but referred to the deeds as being in the possession of a person named, the court thought that the property might easily be ascertained before the master, and held the description of the subject-matter sufficient.(t) And again, a contract to sell an estate within certain ascertained boundaries, *described as partly freehold, and partly leasehold, is not void for uncertainty, because it is a good [*94] agreement to sell the vendor's interest in the property; but the purchaser is entitled to have it reduced to certainty by the boundary of the properties of different tenures being ascertained, or shown to be capable of being so.(u)

§ 213. The names of the contracting parties are another element which must appear in the agreement, or the memorandum of it, in order to constitute a binding contract.(v)

§ 214. In all cases of sale, it is evident that price is an essential ingredient of the contract, and that where this is neither ascertained nor

(l) *Sarl v. Bourdillon*, 1 C. B., N. S. 188. (m) *Ogilvie v. Foljambe*, 3 Mer. 53.

(n) *Clinan v. Cooke*, 1 Sch. & Lef. 21, 33. See post, § 361.

(o) *Skinner v. M'Douall*, 2 De G. & S. 265.

(p) *Price v. Griffith*, 1 De G. M. & G. 80.

(q) *Stewart v. Alliston*, 1 Mer. 26, 33.

(r) *Kennedy v. Lee*, 3 Mer. 441, 451; per Lord Eldon in *Daniels v. Davison*, 16 Ves. 256.

(s) *Price v. Griffith*, 1 De G. M. & G. 80. See also *Inge v. Birmingham, Wolverhampton and Stour Valley Railway Company*, 3 De G. M. & G. 658.

(t) *Owen v. Thomas*, 3 My. & K. 353. See also *Haywood v. Cope*, 4 Jur. N. S. 227, (M. R.)

(u) *Monro v. Taylor*, 8 Ha. 51.

(v) *Champion v. Plummer*, 1 N. R. 253; *Warner v. Willington*, 3 Drew, 523; *Squire v. Whitton*, 1 Ho. Lords, 333.

rendered ascertainable, the contract is void for incompleteness, and incapable of enforcement.(w)

§ 215. Accordingly, where A. agreed to sell an estate to B. for £1500 less than any other purchaser would give, the contract was held void; for, if the estate was not to be sold to any other purchaser than B., it was impossible to know what such a purchaser would give for it.(x) So again, where there was an agreement to sell at a price to be fixed by two surveyors, and they made their award, but that did not sufficiently and finally ascertain the price, specific performance was refused :(y) and the like was the result of a similar case, where the award was such as the court could not act on, by reason of circumstances of great impropriety on the part of one of the arbitrators, and the award being based on an erroneous view of the facts.(z)

§ 216. It is not, however, necessary that the contract should determine the price in the first place. It may appoint a way by which it is [*95] to be thereafter determined, *in which case the contract is perfected only when the price has been so determined.(a) In case of default in this respect, the contract remains imperfect and incapable of being enforced; for the court will never direct a payment of such a sum as A. and B. shall fix.(b)

§ 217. The cases in which a mode is provided by the contract itself for the subsequent ascertainment of the price, fall under two classes: the first comprises those where the contract is to sell at a price to be fixed by arbitrators, this mode of ascertainment being an essential ingredient in the contract; the other embraces those cases where the contract is substantially for a sale at a fair price, the mode of ascertainment, though it may be indicated by the contract, being subsidiary and non-essential. In the former class of cases, if the mode of ascertainment fail, the contract remains incomplete, and consequently incapable of being enforced: in the latter, where the mode of ascertainment has failed, the court will have recourse to some other means of coming at the fair price, and of thus carrying out the contract in its essential parts.

§ 218. Of the first class, *Milnes v. Gery*,(c) before Sir William Grant, may be considered as the leading case: there was there a contract that land should be sold at a price to be fixed by one valuer appointed on each side, or their umpire: the valuers could not agree; and the master of the rolls held the contract to be incomplete, and that the court could not supply the defect by appointing other persons as valuers, which would be to execute a contract different from that of the parties; although, where it is merely an agreement to sell at a fair price, that is a matter which the court can ascertain. "A man," said Sir J. Leach,(d) "who agreed to sell at a price to be named by A., B., and C., could not be com-

(w) *Elmore v. Kingscote*, 5 B. & C. 583; *Goodman v. Griffiths*, 26 L. J. Ex. 145.

(x) *Bromley v. Jefferies*, 2 Vern. 415.

(y) *Hopcraft v. Hickman*, 2 S. & S. 130.

(z) *Chichester v. Macintyre*, 4 Bli. N. S. 79.

(a) Cf. *Inst. lib. iii. tit. 24, s. 1*; *Pothier, du Contrat de Vente*, part 1, sec. 2, art. 2, § 2.

(b) *Darbey v. Whitaker*, 4 Drew, 134.

(c) 14 Ves. 400.

(d) In *Morse v. Merest*, 6 Mad. 26.

elled by a court of equity to sell *at any other price." This principle has governed the decision of several other cases of specific performance,(e) and may further be illustrated by the cases at common law.(f) The fact that the obstacle arises from the defendant's default will not, it seems, get over the difficulty; for where the agreement was to sell at a price to be fixed by arbitrators, but in consequence of the defendant's having refused to execute the arbitration-bond, it was uncertain whether any award would be made, the court refused to proceed;(g) and the same result followed where the refusal of one of the valuers to proceed appeared to arise from the information given to him by the defendant, of his intention not to complete.(h) In a recent case,(i) where the price was to be ascertained by one of two alternative modes, and no election had been made as to the mode of ascertainment, the court held that no contract had been constituted.

§ 219. The second class comprises those cases in which the contract is substantially to sell at a fair price, the mode of ascertaining that being subsidiary. Lord Eldon,(k) indeed, seems to have doubted whether the court would ever take upon itself, in this respect, to separate the essential from the non-essential terms of the contract: he considered that, where a reference had been made to arbitration, and the judgment of the arbitrators was not given in the time and manner according to the agreement, the court had no jurisdiction to substitute itself for the arbitrators, and make the award, even when the substantial thing to be done was agreed between the parties, and the time and manner in which it was to be done was that which *they had put upon others to execute. Sir William Grant, however, not only indicated the distinction of the two classes of cases, in his judgment in *Milnes v. Gery*,(l) but he acted upon it in two other cases before him. In the earlier,(m) in consequence of the lunacy of the vendor, the valuers could not be nominated; but the master of the rolls did not consider this an insurmountable difficulty, saying that, "if there was a valid and binding contract, the supervening incapacity of one party cannot deprive the other of the benefit;" and he accordingly directed an issue as to the lunacy, as a preliminary step in the cause. In the other case,(n) there was an agreement to grant a lease, to contain such conditions as A. B. should think reasonable and proper; and the master of the rolls referred it to the master to settle the lease, and not to A. B.,—considering the agency of A. B. not to be of the essence of the contract, and that the court will not grant relief through the medium of a reference compulsory on the other party. And so in a case(o) before Sir John Stuart, where there

(e) *Blundell v. Brettargh*, 17 Ves. 232; *Gourlay v. Duke of Somerset*, 19 Ves. 429; *Agar v. Macklew*, 2 S. & S. 418; *Darbey v. Whitaker*, 4 Drew, 134.

(f) *Thurnell v. Balburnie*, 2 M. & W. 786; *Morgan v. Birnie*, 9 Bing. 672; *Milner v. Field*, 5 Ex. 829.

(g) *Wilks v. Davis*, 3 Mer. 507. (h) *Darbey v. Whitaker*, 4 Drew, 134.

(i) *Morgan v. Milman*, 3 De G. M. & G. 24.

(k) *In Cooth v. Jackson*, 6 Ves. 34. See also *Blundell v. Brettargh*, 17 Ves. 232.

(l) *Ubi sup.* (m) *Hall v. Warren*, 9 Ves. 605.

(n) *Gourlay v. Duke of Somerset*, 19 Ves. 429.

(o) *Jackson v. Jackson*, 1 Sm. & G. 184; *Paris Chocolate Company v. Crystal Palace Company*, 3 Sm. & G. 119, 123.

was an agreement to sell land and bleach-works at a sum fixed, and the plant and machinery to be taken at a value, to be ascertained by valuers to be appointed by the parties, it was held that this was a subsidiary stipulation only, and that it did not form an obstacle to specific performance, which was accordingly decreed with costs.(p)

§ 220. In another case(q) before the same vice-chancellor, he remarked that, where possession is referable to an agreement to give a fair consideration, the amount of which has not been settled, the court will, in favour of *possession and expenditure referable to this agreement, endeavour by every means within the legitimate bounds of its jurisdiction to ascertain the amount of the consideration.

§ 221. It is of course essential to the completeness of the contract, that it should express not only the names of the parties, the subject-matter, and the price, but all the other material terms. What are, in each case, the material terms of the contract, and how far it must descend into details to prevent its being void as incomplete and uncertain, are questions by no means easy to answer, and must of course be determined by a consideration of each agreement separately. It may, however, be laid down that the court will carry out an agreement framed in general terms, where the law will supply the details; but if any details are to be supplied in modes which cannot be adopted by the court, there is then no concluded agreement capable of being enforced.(r)

§ 222. Though it may be impossible to define what is the necessary completeness in the terms of a contract, it is easy to give instances in which contracts have been held incomplete in this respect. Such was the case where an agreement for a building-lease did not state the time when the term was to commence;(s) where it was not stated what time an increased rent was to commence from;(t) where the agreement did not state the length of the term to be granted, either directly or by reference;(u) where a contract for a lease for lives neither named the lives nor decided by whom they were to be named;(v) where an auctioneer's receipt was set up as a contract, but it did not refer to the conditions of sale, or show the proportion which the deposit was to bear to the price;(w) where there was a term as to the expenses which was not settled by the contract;(x) and where there was a contract for a partnership, which defined the term of years, but was silent as to the amount of capital and the manner in which it was to be provided.(y)

(p) As to the way in which referees as to price ought to proceed, and on what grounds they may determine, see *Eads v. Williams*, 4 De G. M. & G. 674.

(q) *Meynell v. Surtees*, 3 Sm. & Gif. 101, 113, affirmed 1 Jur. N. S. 737.

(r) Per Turner, L. J., in *South Wales Railway Company v. Wythes*, 5 De G. M. & G. 888; per Lord St. Leonards in *Ridgway v. Wharton*, 6 H. C. Lords, 285. See post, § 229.

(s) *Blore v. Sutton*, 3 Mer. 237. See also *Cox v. Middleton*, 2 Drew, 209; *Hershey v. Giblett*, 18 Beav. 174.

(t) *Lord Ormond v. Anderson*, 2 Ba. & Be. 363.

(u) *Clinan v. Cooke*, 1 Sch. & Lef. 22; *Gordon v. Trevelyan*, 1 Pri. 64.

(v) *Wheeler v. D'Esterre*, 2 Dow, 359. But query whether the lessee cannot name the lives when the agreement is silent. See also *Lord Kensington v. Phillips*, 3 Dow, 61.

(w) *Blagden v. Bradbear*, 12 Ves. 466. (x) *Stratford v. Bosworth*, 2 V. & B. 341.

(y) *Downs v. Collins*, 6 Ha. 418.

§ 223. Besides the express terms of the contract, there are others which, in the absence of any expression to the contrary, are implied by presumption.(z) With regard to such terms, therefore, whether they be necessary terms or not, the silence of the contract does not render it incomplete; thus, an agreement to sell land, not specifically expressing what interest, is taken to be an agreement to sell the whole of the vendor's interest.(a) An agreement to sell a house simply, implies that the interest sold is the fee simple;(b) and an agreement to renew, is presumed to be for the same term as the preceding lease.(c)

§ 224. In every contract for the sale of land, a condition is implied for a good title,(d) and for the delivery-up of the deeds; so that where this was prevented by the accidental destruction of the deeds subsequent to the contract, it was held that the vendor could not enforce the sale.(e) The title to be shown, of course varies according to the nature of the property to be sold :(f) in the case of the sale of a lease, it includes the title of the lessor,(g) except in the case of a bishop's [*100] lease.(h) It is to be observed that this is a condition for the benefit of the purchaser, and may accordingly be waived by him, though the vendor may desire to insist on it as a ground for discharging himself from the contract.(i)

§ 225. An agreement for an underlease implies that the sub-lessee is to be subject to the covenants in the superior lease; and it probably also implies that those covenants are usual.(k) With regard to the latter implication, the doctrine of *Cosser v. Collinge*, that it is the sub-lessee's duty to inquire into the covenants of the superior lease, seems against it: but it is at least questionable, if a contract were silent and unusual covenants were found in the head lease, and no possession and no notice had taken place, whether the court would enforce specific performance.(l)

§ 226. But however that may be, this implication, if it exists, may be rebutted, (l) by the sub-lessee's taking possession of the property, it being his duty to inform himself of the covenants before doing so; or (2) by notice, as where the sub-lessee's solicitor has seen the lease, and so has constructive notice of the covenants contained in it.(m)

§ 227. The question whether or not there is a presumption in execu-

(z) The elements of all contracts have by some jurists been placed in three classes: 1st, those things which are essential, without which the contract cannot exist; 2ndly, those which are of the nature but not of the essence of the contract, being implied in it unless expressly excluded, but capable of being thus excluded without subverting the contract; and 3rdly, the things that are accidental. The terms in question correspond of course with the second of these classes. *Pothier, Tr. des Oblig. part. i. ch. i. sec. 1, art. 1, § 3.*

(a) *Bower v. Cooper*, 2 Ha. 408. (b) *Hughes v. Parker*, 8 M. & W. 244.

(c) *Price v. Assheton*, 1 Y. & C. Ex. 82.

(d) *Doe d. Gray v. Stanion*, 1 M. & W. 695, 701; *Worthington v. Warrington*, 5 C. B. 635.

(e) *Bryant v. Busk*, 4 Russ. 1. (f) *Curling v. Flight*, 6 Ha. 41; S. C. 2 Phil. 613.

(g) *Fildes v. Hooker*, 2 Mer. 424; *Souter v. Drake*, 5 B. & Ad. 992; *Hall v. Betty*, 4 Man. & Gr. 410. As to an agreement for the sale of an agreement for a lease, see *Kintrea v. Preston*, 25 L. J. Ex. 287; and see post, § 832 et seq.

(h) *Fane v. Spencer*, 2 Mer. 430, n. (i) *Bennett v. Fowler*, 2 Beav. 302.

(k) *Cosser v. Collinge*, 3 My. & K. 283; *Smith v. Capron*, 7 Ha. 185.

(l) See *Flight v. Barton*, 3 My. & K. 282.

(m) *Cosser v. Collinge*, *Smith v. Capron*, ubi sup.

tory contracts in favour of the insertion in the executed contract of all such stipulations as are *usually inserted in such contracts, appears one still open in our law.(n)

§ 228. An implied term may of course be rebutted by conditions of sale; as where they limit the title to be deduced, or provide that the purchaser shall simply take the vendor's interest.(o) And further, although an express term of a contract is in nowise affected by notice,(p) yet notice is sufficient to rebut the presumption of an implied term; for that is something not growing out of the agreement itself, but given by law, and a matter therefore not of contract but of notice.(q) So that, for instance, where a purchaser has notice that the vendor is only a lessee, he cannot insist on the implication which might otherwise arise, that the contract is for the fee.(r)

[*102]

*CHAPTER IV.

OF THE UNCERTAINTY OF THE CONTRACT

§ 229. It will be obvious that an amount of certainty must be required in the specific performance of a contract in equity greater than that demanded in an action for damages at law. For, to sustain the latter proceeding, the proposition required is the negative one, that the defendant has not performed the contract,—a conclusion which may be often arrived at without any exact consideration of the terms of the contract; whilst in equity it must appear, not only that the contract has not been performed, but what is the contract which is to be performed. It is perhaps impossible to lay down any general rule as to what is sufficient certainty in a contract; but it may be safely stated that the certainty required must be a reasonable one, having regard to the subject-matter of the contract,(a) and the circumstances under which, and with regard to which it was entered into.(b) Thus in one case,(c) where there was an agreement between two railway companies, that the one should have the right of running with their engines, carriages, and trucks, and carrying traffic upon the line of the other, Vice-Chancellor Parker held that this was not too uncertain to be enforced. “It means,” he said, “a reasonable use,—a use consistent with the proper *enjoyment of the subject-matter, and with the rights of the granting party.”(d) And we have already seen that where the terms of the contract are

(n) *Ricketts v. Bell*, 1 De G. & Sm. 335, where the question was much discussed by V. C. Knight Bruce.

(o) *Freme v. Wright*, 4 Mad. 364. (p) *Barnett v. Wheeler*, 7 M. & W. 364.

(q) *Ogilvie v. Foljambe*, 3 Mer. 53, 64.

(r) *Cowley v. Watts*, 17 Jur. 172, (M. R.) (a) See Arist. Eth. Nic. lib. i. c. 3.

(b) *Marsh v. Milligan*, 3 Jur. N. S. 979, (Wood, V. C.)

(c) *Great Northern Railway Company v. Manchester, Sheffield, and Lincolnshire Railway Company*, 5 De G. & Sm. 138.

(d) p. 149.

general, but the details are such as the law will supply, the contract will not be considered as objectionable for vagueness and uncertainty.(e) In one case a contract by a railway company with a landowner, to make such roads, ways, and slips for cattle as might be necessary, was not held incapable of being performed by the court; but it is to be observed that in this case the company had entered and made the railway.(f)

§ 230. On the ground of uncertainty, the court has refused specifically to perform marriage-articles prepared by a Jewish rabbi in an obscure form, said to prevail amongst German Jews;(g) and also an agreement for the sale of land, where there was a doubt as to the identification of a plan to be incorporated into the agreement.(h) In another case(i) the court refused to interfere in respect of an engagement by the defendant, Mr. Kean, to perform at a theatre. "Independently of the difficulty of compelling a man to act," said the vice-chancellor, "there is no time stated, and it is not stated in what character he shall act; and the thing is altogether so loose that it is perfectly impossible for the court to determine upon what scheme of things Mr. Kean shall perform his agreement."(k)

§ 231. So again, where the agreement is discrepant with itself, or there are two different agreements relating to the same subject-matter, the court will generally refuse specific performance.(l) In a recent case,(m) where an offer was *made to take a house for a specific term and at a certain rent, if put into thorough repair, and stating also that the drawing-rooms would be required to be handsomely decorated according to the present style, and making some further requirements as to painting, and the offer was accepted, the lords justees, reversing a decision of the master of rolls, dismissed the bill on the ground of the uncertainty imported into the agreement by the expressions in the offer as to repairs. Where a contract was for the purchase of "the land required" for the construction of a railway, at so much per acre, and the contract contained provisions agreed on between the land agents of the company and the vendor as to roads, culverts, etc. etc., the master of the rolls (following the decision of Vice-Chancellor Turner in *Webb v. Direct London and Portsmouth Railway Company*,(n) then unreversed) held that a surveyor going upon the ground and having the contract in his hand, could accurately ascertain the land to be taken, and that the terms of the contract were therefore sufficiently explicit; but this decision was overruled on appeal, and Lord Justice Knight Bruce held the language "too vague, too uncertain, too obscure to enable this court to act with safety or propriety."(o)

(e) *Per Turner, L. J.*, in *South Wales Railway Company v. Wythes*, 5 De G. M. & G. 888; ante, § 221.

(f) *Saunderson v. Cockermouth and Workington Railway Company*, 11 Beav. 497, affirmed by Lord Cottenham; *Parker v. Taswell*, 4 Jur. N. S. 183, (Stuart, V. C.); see ante, § 204.

(g) *Franks v. Martin*, 1 Ed. 309. (h) *Hodges v. Horsfall*, 1 Russ. & M. 116.

(i) *Kemble v. Kean*, 6 Sim. 333.

(k) p. 337.

(l) *Callaghan v. Callaghan*, 8 Cl. & Fin. 374.

(m) *Taylor v. Portington*, 7 De G. M. & G. 328.

(n) 9 Ha. 129.

(o) *Lord James Stuart v. London and North-western Railway Company*, 15 Beav. 513; S. C. 1 De G. M. & G. 721.

§ 232. In another case, where there was an agreement in general terms for the construction of a railway according to the terms of a specification to be prepared by the engineer of the company for the time being, it was held too vague, obscure, and uncertain to be enforced : (p) and the like was held in the case of an agreement to give the plaintiffs accommodation for the sale of their articles in the refreshment-rooms of the defendants, and to furnish them with the necessary appliances. (q) And again, where on the sale *of a piece of land there were stipulations that, in the event of there being any coals or ironstone under the land, a royalty of so much per ton should be paid thereon by the purchaser to the vendor, and also that any mines required to be left by a certain railway company were to be paid for as if the same had been gotten, out of the money to be received from the railway company ; it was held, with regard to the latter stipulation, that it was incapable of being worked out, inasmuch as, if the company bought the mines, the contingency whether there were any coal or ironstone under the land would remain undecided ; and as to the former stipulation, that the parties seemed to have intended to work it out by a reservation of mines to the vendor, and a lease of them by the vendor to the purchaser, but that there was nothing to guide the court as to the stipulations to be included in such a lease, except the rates of royalty ; and the court accordingly declined to enforce the agreement for sale. (r) •

[*106]

CHAPTER V.

OF THE WANT OF FAIRNESS IN THE CONTRACT.

§ 233. THERE are many instances in which, though there is nothing that actually amounts to fraud, there is nevertheless a want of that equality (a) and fairness in the contract which, as we have seen, are essential in order that the court may exercise its extraordinary jurisdiction in specific performance. In cases of fraud the court will not only not perform a contract, but it will order it to be delivered up to be cancelled ;

(p) South Wales Railway Company v. Wythes, 5 Dc G. M. & G. 880.

(q) Paris Chocolate Company v. Crystal Palace Company, 3 Sm. & Gif. 119.

(r) Williamson v. Wootton, 3 Drew, 210. See also, for uncertainty, Harnett v. Yielding, 2 Sch. & Lef. 549; Tatham v. Platt, 9 Ha. 660; Taylor v. Gilbertson, 2 Drew, 391; Holmes v. Eastern Counties Railway Company, 3 K. & J. 675; Sturge v. Midland Railway Company, Week. Rep. 1857-1858, 233, (Stuart, V. C.); ante, § 42.

(a) The equality which natural justice requires to find place in contracts is well explained by Grotius, *De Jure Belli ac Pacis*, lib. ii. cap. 12, sec. 8 et seq. According to him, it consists partly in acts, (and these, as well the precedent acts, as the principal act,) and partly in the subject-matter of the contract. As to the precedent acts, equality is required between the parties, both as to the knowledge of the thing and the exercise of the will; as to the principal act, the equality required is, that more be not demanded than is just; and lastly, as to the subject-matter, the equality is to be sought in the absence of all hidden defects in it or mistakes as to it.

but there are many cases in which the court will stand still, and interfere neither for the one purpose nor the other.(b)

§ 234. The unfairness in question may be either in the terms of the contract itself, or it may be in matters extrinsic and the circumstances under which it was made: with regard to the latter, parol evidence is of course admissible.(c)

*§ 235. The fairness of the contract, like all its other qualities, must be judged of at the time it is entered into, and not by subsequent events :(d) for the fact that events, uncertain at the time of the contract, may afterwards happen in a manner contrary to the expectation of one or both of the parties, is no reason for holding the contract to have been unfair. Therefore, “where parties, whose rights are questionable, have equal knowledge of facts, and equal means of ascertaining what their rights really are, and they fairly endeavour to settle their respective rights amongst themselves, every court must feel disposed to support the conclusions or agreements to which they may fairly come at the time, and that notwithstanding the subsequent discovery of some common error”(e) or a subsequent judicial decision showing the rights of the parties to have been different to what they supposed, or that one party had nothing to give up.(f) And the uncertainty which may render a compromise fair, and therefore binding, may be either in some future and uncertain event, or the future ascertainment of some event past and therefore in itself certain, as, for instance, whether a son was legitimate or not,(g) or whether an uncle had made a particular will or not.(h)

§ 236. The principle just stated is perhaps most frequently illustrated by cases of family arrangement or of compromise; but it is applicable to contracts of whatsoever nature. The case of Parker v. Palmer,(i) which came before the court in the fourteenth year of Charles II., illustrates this. Parker, as it appears, during the commonwealth, had sold a lease, which he had from a dean and chapter for three lives, to Palmer, the price agreed on being £4320. Subsequently the purchaser agreed with the vendor, that if *he would abate him £420, he would reconvey the lease whenever the king and dean and chapter were restored: the abatement was made, and the king and church restored, and thereupon the vendor sued for a reconveyance, which was accordingly decreed by the master of the rolls, and affirmed by the lord chancellor and Sir Orlando Bridgeman. Again, where a man agreed to sell for £20 an allotment thereafter to be made to him under an enclosure, and it turned out to be worth £200, he was nevertheless compelled to perform his agreement:(k) and so in a case(l) before Sir John Leach, where he maintained

(b) See per Lord Eldon in Willan v. Willan, 16 Ves. 83; Savage v. Taylor, Forr. 234; Twining v. Morrice, 2 Bro. C. C. 326; Savage v. Brooksopp, 18 Ves. 335; per C. B. in Davis v. Symonds, 1 Cox, 406; Redshaw v. Bedford Level, 1 Ed. 346.

(c) Davis v. Symonds, 1 Cox, 402.

(d) So, as to hardship, see post, § 252.

(e) Per Lord Langdale in Pickering v. Pickering, 2 Beav. 56; Frank v. Frank, 1 Cas. in Ch. 84.

(f) Lawton v. Campion, 18 Beav. 87.

(g) Stapilton v. Stapilton, 1 Atky. 2.

(h) Heap v. Tonge, 9 Ha. 90.

(i) 1 Cas. in Ch. 42.

(k) Anon. before Sir Jos. Jekyll, cited in Cooth v. Jackson, 6 Ves. 24.

(l) Ex parte Peake, 1 Mad. 346.

NOVEMBER, 1858.—7

a contract entered into without any fraud or concealment, by which one partner agreed with the retiring partner to give him £2000 for the concern, though they knew the partnership to be insolvent, his honor, said, “Suppose the case of a trade attended with great risk, one partner despairing, the other confident and willing to buy the share of his partner, and give him £2000 for it; on what possible ground could this contract be invalidated?”^(m) The cases in which the thing sold is described in general terms,—as, for example, a manor,—and the extent and value of it is at the time uncertain,⁽ⁿ⁾ and also the cases in which the vendor only sells such interest in the property as he has, where that which is sold turns out differently to the purchaser's expectations, are analogous to those before-stated.^(o)

§ 237. But, in order to bring a contract within this principle, the events which are afterwards reduced to a certainty must at the time of the contract have been really uncertain and unascertained to both parties, either from the nature of things or the state of knowledge of both parties. A contract entered into by one party who knows, with another who does not know, will not, it seems, be *executed by the court, though its terms [*109] may be such as to put the ignorant party on his guard, and to throw the uncertainty on him. In one case, the particulars described the subject of the sale as the interest, if any, of Francis Norton, in certain stock and also in a lease, and stated that there was a lien of £100 on the lease, and the conditions provided that, even if it should appear that Francis Norton had no interest in the premises, the purchaser should have no remedy against the vendor to compel him to refund; in consequence of the state of certain partnership accounts which was known to the vendor, but which the purchaser had no means of ascertaining, the interest sold was of no value whatsoever, and was in fact only exposed to sale for the purpose of enabling certain proceedings to be taken against the separate estate of Francis Norton: the vendor made no representations as to the value, but received from the purchaser £150 as the purchase-money: the vice-chancellor, Wood, set aside the sale at the suit of the purchaser, with costs against the vendor, on the ground that the purchaser was buying what might be worth nothing, whilst the vendor was selling what was worth nothing.^(p)

§ 238. Further, the principle in question will not apply where, though the terms of the contract may express an uncertainty, that uncertainty was not understood by the parties to comprise the event which actually happens. Thus, where A. contracted with B. for the sale of a manor, and stipulated that he should not be obliged to define its boundary, and the manor turning out to comprise a valuable property not before known to either party to be part of it, the purchaser, who had previously sought to repudiate the contract, filed his bill for performance, the master of the rolls, on consideration of the evidence, came to the conclusion that neither [*110] party intended to sell or buy a *mere doubtful matter, and that both parties at the time of the contract believed that it included

(m) p. 355. See also *Haywood v. Cope*, 4 Jur. N. S. 227, (M. R.)

(n) *Baxendale v. Seale*, 19 Beav. 601.

(o) See post, § 830.

(p) *Smith v. Harrison*. 26 L. J. Ch. 412, (Wood, V. C.) infra, § 243.

something different from what would then be conveyed to the plaintiff, if the conveyance were to be executed as he claimed it, and accordingly dismissed the bill, but without costs.(q)

§ 239. In judging of the fairness of a contract, the court will look not merely at the terms of the agreement itself, but at all the surrounding circumstances,—such as the mental incapacity of the parties, though falling short of insanity,(r) their age or poverty, the manner in which the agreement was executed, the circumstances that the parties were acting without an attorney, that the property was reversionary, or that the price was not the full value.(s)

§ 240. Therefore, whenever there are evidences of distress in the party against whom performance is sought,(t) or he was an illiterate person, or whenever there are any circumstances of surprise, or want of advice,(u) or anything which seems to import that there was not a full, entire, and intelligent consent to the contract,(v) the court is extremely cautious in carrying it into effect. Still it is not the doctrine of the court that a man cannot contract without his solicitor at his elbow,(w) or that a man in insolvent circumstances, or in prison, is disabled from selling his estate: and if a contract made under such circumstances *will bear the [*111] careful examination of the court and the full light of day, it will be specifically performed.(x)

§ 241. It is enough, generally speaking, to induce the court to refuse performance, that there are any circumstances about the making of the contract which render it not fair and honest to call for its execution; it is not needful that there was any intentional unfairness or dishonesty at the time.(y) A leading case on this subject is *Twining v. Morrice*,(z) where the bill was by a purchaser against a vendor: at the sale, which was by auction, the solicitor, who was known to be the agent of the vendor, had made some biddings for the plaintiff, which from his known relationship to the vendor, were thought to be the biddings of a puffer, and so damped the sale: the act was done in inadvertence by the solicitor; but as it was done at the plaintiff's instance, specific performance was refused by Lord Kenyon.

§ 242. The like refusal to interfere will follow where there has been an improper suppression of a fact by one party from another: as where an estate required that a wall should be repaired, to protect it from the

(q) *Baxendale v. Seale*, 19 Beav. 601.

(r) *Clarkson v. Hanway*, 2 P. Wms. 203; *Gartside v. Isherwood*, 1 Bro. C. C. 558; *Bridgman v. Green*, Wilm. Not. 58, 61. See ante, § 161.

(s) *Bell v. Howard*, 9 Mod. 302; *Martin v. Mitchell*, 2 J. & W. 413, 423; *Stanley v. Robinson*, 1 R. & M. 527.

(t) *Kerneys v. Hansard*, Coop. 125; *Johnson v. Nott*, 1 Vern. 271.

(u) *Stanley v. Robinson*, 1 R. & M. 527; *Helsham v. Langley*, 1 Y. & C. C. C. 175.

(v) The nature of the proper consent to a contract seems not incorrectly expressed in the following extract:—"Consensus debet esse: 1, verus seu internus et mutuus; 2, aliquo signo externo expressus; 3, liber et plene deliberatus; 4, serius, cum animo se obligandi."—*Mariani Examen*, § 278.

(w) *Lightfoot v. Heron*, 3 Y. & C. Ex. 586; *Haberdashers' Company v. Isaac*, 3 Jur. N. S. 611, (Wood, V. C.)

(x) *Brinkley v. Hance Dru*. 175.

(y) *Mortlock v. Buller*, 10 Ves. 292, 305.

(z) 2 Bro. C. C. 326.

river Thames, and this was industriously suppressed; (a) and where A. agreed to sell his land to B. at a halfpenny per square yard, which amounted to about £500, when the real value of the estate was £2000, and B. industriously suppressed this circumstance from A., the concealment was considered such a fraud as to avoid the transaction; (b) and where a lessee obtained the renewal of a lease on the surrender of an old one, knowing and suppressing the fact, which was unknown to the lessor, that the person on whose life the old lease depended was *in extremis*, the court declined to aid the lessee. (c) And in a recent case, (d) before Lord Cranworth, where the same *solicitor acted for both parties, [*112] but did not disclose to both parties the whole nature of the dealing, or place his principals at arms' length in the transaction, the court refused to enforce specific performance at the suit of the purchaser. The cases turning on the suggestion of what is false, which constitutes a misrepresentation, will be considered elsewhere. (e)

§ 243. We have already seen that, whatever be the form of the contract, where, at the time of entering into it, one party was cognizant of a fact of which the other could not be informed,—so that what was certain to the one was represented as, and was, in fact, uncertain to the other,—the court will not interfere specifically to perform it. (f)

§ 244. On the ground of want of fairness, the court will not assist one party to a contract, specifically to enforce it against the other, who, at the time of entering into it, was in a state of intoxication, and that even in the absence of any unfair advantage taken of his situation, which would induce the court to rescind the contract. (g) But the mere fact that some glasses of liquor had been drunk before the signing of the contract will not avoid it, if there be nothing to show that the defendant acted without a full understanding of what he was doing. (h) In a recent case, Vice-Chancellor Stuart refused to allow a third party, who, having got a subsequent transfer of the property, was the substantial defendant, to avail himself of this defence. (i)

§ 245. One kind of that unfairness which stays the interference of the court arises where the enforcement of the contract would be injurious to third persons. Therefore, where an estate was settled in strict settlement, [*113] giving to *the settlor a life estate and an ultimate remainder, and the tenant for life entered into a contract for the sale of the fee, the court refused to allow the purchaser to take the interest of the tenant for life with compensation, on the ground that a father and a stranger would be likely to use an estate without impeachment of waste in a different way, and that therefore the sale might prejudice the interests of the persons in remainder. (k)

(a) Shirley v. Stratton, 1 Bro. C. C. 440. (b) Deane v. Rastron, 1 Ans. 64.
 (c) Ellard v. Lord Llandaff, 1 Ball & B. 241. See also post, § 461 et seq.

(d) Hesse v. Briant, 6 De G. M. & G. 623. (e) Post, § 425, et seq.

(f) Smith v. Harrison, 26 L. J. Ch. 412, (Wood, V. C.) stated ante, § 237.

(g) Cooke v. Clayworth, 18 Ves. 12; Nagle v. Baylor, 3 Dr. & W. 60. In Butler v. Mulrihill, 1 Bli. 137, a contract obtained by fraud from an intoxicated party was set aside.

(h) Lightfoot v. Heron, 3 Y. & C. Ex. 586.

(i) Shaw v. Mackray, 1 Sm. & G. 537. (k) Thomas v. Dering, 1 Ke. 729.

§ 246. And a settlor in a voluntary settlement will not be allowed to sue for a sale of the estate so as to override that settlement, and thus to prejudice the interests of the parties claiming under it.(l)

§ 247. The court will never exercise its extraordinary power in compelling a specific performance, where to do so would necessitate a breach of trust, or compel a person to do what he was not lawfully competent to do,—partly, as it seems, on the ground of the unfairness and illegal taint of such a contract in itself, and partly of the hardship to which it would expose the person forced to execute it. The plaintiff "must also," said Lord Redesdale,(m) "show that, in seeking the performance, he does not call upon the other party to do an act which he is not lawfully competent to do; for, if he does, a consequence is produced that quite passes by the object of the court in exercising the jurisdiction, which is to do more complete justice." Therefore, where trustees enter into a binding agreement for a sale under a power, but so disadvantageous as to be a breach of trust, the court will not specifically perform the agreement :(n) and so, again, where trustees for sale for the benefit of creditors made a sale by auction, under circumstances *of improvidence and likely [*114] to prejudice the owner of the estate, for the sake of immediately realizing money to pay his creditors, the court pursued the same course.(o) And where, on the sale of trust property, it was agreed that the purchaser should out of the purchase-money retain a private debt due to him from the trustee, a demurrer to a bill by the trustee was allowed.(p) And again, where trustees entered into an agreement for a lease which was in excess of their power:(q) and again, where they entered into a covenant for renewal which was *ultra vires*, the court, on this ground, in both cases, refused specific performance.(r) And where trustees for sale misrepresented the value of the property, when they had the means in their power of stating it correctly, and the conditions of sale stipulated for compensation on either side, the lords reversed a decree for compensation on the ground that the court would not carry out a condition which would injure the cestuis que trust, by reason of the neglect of the trustees in making the misdescription which was the ground for compensation.(s) And in a recent case, the court refused performance of a contract for the sale of leasesholds by one of two executors, on the ground that, under the circumstances of the case, it would be an injury to the cestuis que trust, and expose the executor to extraordinary risk from them, and that either of these grounds was sufficient to stay the interference of the court.(t)

(l) Johnson v. Legard, T. & R. 281; Smith v. Garland, 2 Mer. 123.

(m) In Harnett v. Yielding, 2 Sch. & Lef. 553.

(n) Mortlock v. Buller, 10 Ves. 292. Accordingly Bridger v. Rice, 1 J. & W. 74; Wood v. Richardson, 4 Beav. 174; Maw v. Topham, 19 Beav. 576. See also Hill v. Buckley, 17 Ves. 394; Neale v. Mackenzie, 1 Ke. 474.

(o) Ord v. Noel, 5 Mad. 438. (p) Thompson v. Blackstone, 6 Beav. 470.

(q) Harnett v. Yielding, 2 Sch. & L. 549. Accordingly Byrne v. Acton, 1 Bro. P. C. 186.

(r) Bellringer v. Blagrave, 1 De G. & S. 63.

(s) White v. Cuddon, 8 Cl. & Fin. 766, overruling S. C. s. n. Cuddon v. Cartwright, 4 Y. & C. Ex. 25.

(t) Sneesby v. Thorne, before Wood, V. C., 1 Jur. N. S. 536, affirmed by L. J. J.

[*115] § 248. Even where there is nothing amounting to a distinct breach of trust the court will be delicate of interfering against trustees; so that where, in a contract for sale by them, there is any want of a business-like character, the court will not, it seems, interfere, unless the price be shown to be equal, or more than equal, to the value of the property.(u)

§ 249. The doctrine does not apply only to persons standing in the position of formal trustees, but, it seems, to all cases of trust and confidence. So, that if a contract were the result of a gross breach of trust by an agent towards his principal, the court would not, it seems, enforce the consequences of that act.(v) And so, railway directors being trustees for the shareholders, and perhaps for the public also, the court will not enforce any agreement amounting to a breach of trust to the prejudice of all or any of the shareholders at the instance of a plaintiff cognizant of the circumstances.(w)

§ 250. The court has on this ground not only refused specific performance, but in a case,(x) where the purchaser must have known that assignees in bankruptcy were dealing without sufficient knowledge, and that the creditors who were to ratify it were equally ignorant, the court, on the ground of the breach of trust of the assignees (as well as other grounds,) set aside the contract.

[*116]

*CHAPTER VI.

OF THE HARDSHIP OF THE CONTRACT.

§ 251. It is a well-established doctrine, that the court will not enforce the specific performance of a contract, the result of which would be to impose great hardship on either of the parties to it.(a)

§ 252. The question of the hardship of a contract is generally to be judged of at the time at which it is entered into: if it be then fair and just, it will be immaterial that it may, by the force of subsequent circumstances or change of events, have become less beneficial to one party,(b) except where these subsequent events have been in some way due to the party who seeks the performance of the contract. For whatever contingencies may attach to a contract, or be involved in the per-

id. 1058; S. C. 7 De G. M. & G. 399. See also *Magram v. Archbold*, 1 Dow, 107. But in *Barrett v. Ring*, 2 Sm. & Gif. 43, Stuart, V. C., compelled trustees of a road to complete a contract for sale which had been made in forgetfulness of a statutory right of pre-emption, and might expose them to an action for damages.

(u) *Goodwin v. Fielding*, 4 De G. M. & G. 90.

(v) *Mortlock v. Buller*, 10 Ves. 292, 313.

(w) *Shrewsbury and Birmingham Railway Company v. London and North-western Railway Company*, 4 De G. M. & G. 115, affirmed and this principle approved 6 H. L. Lords, 113; cf. ante, § 260. (x) *Turner v. Harvey*, Jac. 169.

(a) Per Lord Brougham in *Gould v. Kemp*, 2 My. & K. 308.

(b) *Lawder v. Blachford*, Beat. 522; *Webb v. Direct London and Portsmouth Railway Company*, 9 Ha. 129.

formance of either part, have been taken upon themselves by the parties to it. And so at law, the reasonableness of a contract is to be judged of at the time it is entered into, and not by the light of subsequent events ;(c) and we have already seen that the same principle applies in considering the fairness of a contract.(d)

§ 253. On this ground it has been decided by several cases in Ireland, that where a lessee of renewable leaseholds, *covenants with his sub-lessee for renewal without fine on every renewal to himself, [*117] and subsequently a renewal is made to him, but on terms far less beneficial than had been the custom at the time he entered into the covenant, and on the expectation of the continuance of which he has so covenanted, he will nevertheless be obliged to renew to his sub-lessee, and that without any contribution towards the increased fine which he has paid.(e) So where railway companies contract for the purchase of land, and by their laches their powers expire before the completion of the purchase, that circumstance furnishes them with no ground of defence.(f)

§ 254. This is further well illustrated by the cases on awards : for where the agreement contained in the submission is unfair, or conducting to hardship, the court will not interfere ;(g) whereas hardship or unreasonableness in the award itself will not be a bar to the interference of the court ; for the submission and not the award is the agreement, and unreasonableness in the award is therefore a matter subsequent, and arising from the decision of a judge whom the parties themselves have chosen, and the risks attending whose judgment they have taken on themselves.(h)

§ 255. It cannot however be denied that there are cases in which the court has refused its interference, by reason of events subsequent to the contract. Thus in the *City of London v. Nash*,(i) where a party had covenanted to re-build several houses, and, instead of so doing, had built but two new houses and only repaired the others, but in so doing had laid out at least £2200, and put them in very good condition ; Lord Hardwicke holding that the covenant was *one which in its [*118] nature the court could enforce, yet considered that specific performance would entail so great a loss and hardship on the defendant, and be so useless to the plaintiff, that the court would not enforce it, whether the defendant had mistaken the sense of the covenant to re-build, or perhaps had even knowingly evaded it. And so again, where a mortgagor had entered into a contract to grant a lease, expecting to obtain the mortgagee's consent, but failed in this, and was in circumstances which rendered him practically unable to redeem : in a suit instituted by the intended lessee, the court refused specific performance, but granted the alternative prayer of the bill for rescission.(k)

(c) *Jones v. Lees*, 26 L. J. Ex. 9.

(d) See ante, § 235.

(e) *Evans v. Walshe*, 2 Sch. & Lef. 419 ; *Revell v. Hussey*, 2 Ball & B. 280 ; *Lawder v. Blachf. Beat*. 522. See also *Haywood v. Cope*, 4 Jur. N. S. 227, (M.R.)

(f) *Hawkes v. Eastern Counties Railway Company*, 1 De G. M. & G. 737, 755 ; S. C. 5 Ho. Lords, 331.

(g) *Nickles v. Hancock*, 7 De G. M. & G. 300. See post, §§ 977, 979.

(h) *Wood v. Griffiths*, 1 Sw. 43. (i) 3 Atky. 512 ; S. C. 1 Ves. Sen. 12.

(k) *Costigan v. Hastler*, 2 Sch. & Lef. 160.

§ 256. Notwithstanding these cases the general rule seems to be, that events subsequent to the contract, and not so involved in it as to render it unequal at the time it is entered into, cannot be brought forward to show the hardship of enforcing it. But where the subsequent events alleged for this purpose are acts of the plaintiff himself, or events in some sense within his power, the court may have regard to them in exercising its discretionary jurisdiction in specific performance. There are cases in which the court has considered that, by means of these events, such a change has taken place in the relative position of the plaintiff and defendant, as to render it inequitable specifically to enforce the contract against the latter. The leading case on this head is *The Duke of Bedford v. The Trustees of the British Museum*,^(l) before Lord Eldon and Sir Thomas Plumer. The Duke of Bedford being in the occupation of Southampton House (afterwards called Bedford House) as his residence, in 1675 conveyed to Mr. Montagu adjoining land, for the purpose of his erecting on it a mansion, with suitable appendages of gardens and offices; and Mr. Montagu entered into covenants with the duke not to use the land in a particular manner, with a *view to [*119] the more ample enjoyment by the duke of the adjoining lands. The duke, or those claiming under him, subsequently covered these lands, or a considerable part of them, with houses, and Southampton House was pulled down to make way for streets and buildings. On a motion for an injunction to restrain the defendants, who claimed under Mr. Montagu, from using the land in a way at variance with the covenants of the deed of 1675, Lord Eldon and Sir Thomas Plumer held that the duke having altered the state of the property in the way he had, it would be inequitable, unreasonable, and unjust, thus to enforce the covenants specifically, and the plaintiff was left to his remedy at law.^(m) And so, long acquiescence in a variation from the mode of renewal pointed out by a covenant for that purpose has been held a reason for not specifically enforcing the covenant in its original terms.⁽ⁿ⁾

§ 257. It would seem, that in considering the hardship which may flow from the execution of an agreement, the court will consider whether it is a result obviously flowing from the terms of the contract, so that it must have been present at the time of the contract to the minds of the contracting parties, or whether it arises from something collateral, and so far concealed and latent, as that it might not have been thus present to their minds.^(o) It is obvious that a far higher degree of hardship must be present in the former, than in the latter class of cases, for it to operate on the discretion of the court. Thus, in a case^(p) where, under an agreement, the issue of a first marriage claimed the whole of the real estates of their father, to the exclusion of the issue of a second marriage, Lord Eldon said,^(q) speaking of the hardship which [*120] the defendants alleged would result from the carrying out of *this agreement, that, "unless hardship arises to a degree of incon-

(l) 2 My. & K. 552.

(m) See per Knight Bruce, L. J., in *Shrewsbury and Birmingham Railway Company v. Stour Valley Railroad Company*, 2 De G. M. & G. 882.

(n) *Davis v. Hone*, 2 Sch. & Lef. 341.

(p) *Preble v. Doghurst*, 1 Sw. 309.

(o) See e. g. cases stated, § 261.

(q) p. 329.

venience and absurdity, so great that the court can judicially say such could not be the meaning of the parties, it cannot influence the decision.” His lordship’s remark, no doubt, applied to cases such as the one then before him, where the question being one of the construction of an instrument, hardship is used as an argument, to show that a particular construction cannot be the right one; and the observations therefore cannot, it seems, be applied to hardship, when used to influence the discretion of the court in the exercise of its extraordinary jurisdiction in specific performance.

§ 258. The cases which have been already quoted as showing that the hardship must be judged of at the time of the contract, also illustrate another obvious principle, namely, that where the hardship has been brought upon the defendant by himself, it shall not be allowed to furnish any defence against the specific performance of the contract,(r) at least whenever the thing he has contracted to do is “reasonably possible.”(s)

§ 259. Nor will it constitute a case of hardship that the ultimate object which a party had in view in entering into a contract may have become impossible: the mere failure of the purchaser’s speculation will not discharge him from his obligations to the vendor. Thus, where one person contracted with another for the purchase of a piece of land on which he intended to erect a mill, for which the consent of a corporation was requisite, the refusal to give this consent furnished no defence to the purchaser, although he had, in consequence of the object he had in view, given a very high price for the ground.(t)

*§ 260. In cases against companies, the court will not consider the hardships which may result to the individual members [*121] from enforcing a contract made by the whole body; “for it cannot recognize any party interested in the corporation, but must look to the rights and liabilities of the corporation itself;”(u) and though, as we have seen,(v) the decision of the case in which this language was used by Lord Cottenham has recently been disapproved of in the house of lords, this principle seems to be untouched, and to rest on solid reasoning.

§ 261. If the execution of the contract would render the defendant liable to a forfeiture, the court will regard this as a circumstance of hardship: so where a man was entitled to a small estate under his father’s will, on condition that, if he sold it within twenty-five years, half the purchase-money should go to a brother: the owner agreed to sell it, but Lord Hardwicke held that the hardship was sufficient to determine the court not to interfere.(w) So where a lessee sold certain lots of building

(r) See per Lord Hardwicke in *Pembroke v. Thorpe*, 3 Sw. 443, n.

(s) Per Knight Bruce, V. C., in *Storer v. Great Western Railway Company*, 2 Y. & C. C. C. 52.

(t) *Adams v. Weare*, 1 Bro. C. C. 567; per Turner, V. C., in *Webb v. Direct London and Portsmouth Railway Company*, 9 Ha. 140; per M. R. in *Lord James Stuart v. London and North-western Railway Company*, 15 Beav. 523, and cases next cited.

(u) Per Lord Cottenham in *Edwards v. Grand Junction Railway Company*, 1 My. & Cr. 674; *Hawkes v. Eastern Counties Railway Company*, 1 De G. M. & G. 737, 754; cf. ante, § 249.

(v) See ante, § 145.

(w) *Faine v. Brown*, cited 2 Ves. Sen. 307.

ground, and agreed to make a road, which it was found he could not do without incurring the risk of forfeiting a piece of leasehold land through which it was to pass, or of being sued by the lessor, the court, granting the purchaser specific performance of the agreement for sale, refused to enforce this stipulation, but gave him compensation for the non-performance of it.(x)

§ 262. To this head of hardship, we may perhaps best refer the cases which establish that, where the vendor is liable to certain covenants and has not expressly stipulated *that the purchaser shall indemnify him against them, yet so soon as the purchaser has notice of them, whether by the particulars of sale(y) or subsequently to the contract,(z) he is bound to elect either to rescind the contract or to execute an indemnity to the vendor: for otherwise the vendor would lose his land but retain his liability in respect of it. In the earlier of the cases cited, it was only decided that the purchaser, as plaintiff, could not enforce specific performance without entering into such indemnity; but in the latter, that the vendor, as plaintiff, might put the purchaser to his election.

§ 263. In one case where trustees had joined their cestuis que trust in a contract for sale, and had personally agreed to enonerate the estate from the encumbrances, and it did not appear whether the purchase-money would be sufficient to discharge them, or what would be the extent of the deficiency, the court refused specific performance on the ground of hardship, although the plaintiff had had possession of the estate, and could not be deprived of the benefit of his contract without great inconvenience.(a) In another case a mortgagee with power of sale had obtained a foreclosure decree, and, intending to sell as absolute owner, entered into a contract for sale to the plaintiff. In the contract there was copied, by inadvertence, from conditions of sale of other parts of the estate drawn up sometime before, a clause stating the vendor to be a mortgagee with power of sale: the vendor offered to convey as owner under the foreclosure decree, but the purchaser insisted on a title under the power of sale; but the court held, that to impose on the vendor the risk of opening the foreclosure decree by such a sale, was a hardship which it would not put on him, and accordingly dismissed the bill unless the plaintiff would accept the conveyance which the defendant [*123] was ready to execute.(b)

§ 264. But where a tenant for life had agreed to grant a mining lease, and to a bill by the intended lessee he objected that he was only tenant for life, and that he could not grant the lease in question under his power, and that he should be accountable for waste, Lord Nottingham appears to have considered this to be no defence, and he decreed the defendant to carry out the contract so far as he was capable of doing.(c)

§ 265. In one case Lord Hardwicke, on the ground of hardship, re-

(x) *Peacock v. Penson*, 11 Beav. 355.

(y) *Mexhay v. Inderwick*, 1 De G. & Sm. 708.

(z) *Lukey v. Higgs*, 24 L. J. Ch. 495, (Kindersley, V. C.)

(a) *Wedgwood v. Adams*, 6 Beav. 600.

(b) *Watson v. Marston*, 4 De G. M. & G. 230.

(c) *Cleaton v. Gower, Finch*, 164; but see the cases stated ante, § 245 et seq.

fused specific performance of a covenant to leave buildings in repair contained in an ecclesiastical lease, the fact of the description of the buildings being continued from lease to lease, without variation, showing that the buildings in question might not have been in being at the time of the making of the lease.(d)

§ 266. And where a lessee of mines covenanted that if at *any time* before the expiration of the lease, the lessor should give notice of his desire to take the machinery and stock about the mines, the lessee would at the expiration of the lease deliver the articles specified in the notice to the lessor, on his paying the value, to be ascertained by valuation, the court held the covenant thus framed to be so injurious and oppressive to the lessee, that it refused specific performance, and would not interfere to prevent a breach by injunction.(e)

§ 267. Where A., in consideration of B.'s not joining in barring an entail, agreed to convey to him, his heirs or assigns, the fee of such parts of the estates, which were situated in three counties, as he or they should choose, to the yearly value of £200 : the inconvenience and hardship to which such an option might expose the party who had *granted it, was one ground on which specific performance was refused by [*_124] the house of lords.(f) In another case the court refused to enforce an agreement for service by which a young man placed himself almost entirely in the power of certain great traders, by whom he was employed as traveller and clerk.(g)

§ 268. Where a contract, if enforced, would make a man buy what he could not enjoy, the court will refuse to interfere on the ground of hardship, as in the case of a contract to sell a piece of land to which no way could be shown, the contract itself being silent as to any right of way.(h)

§ 269. The principle applies equally to contracts between companies as to those between private individuals; and therefore, where the result of such a contract was to divert from its legitimate channel a considerable portion of the profits of one part of the line of one company for the benefit of the other, without securing any corresponding portion of profits of the other line, the court refused to interfere by way of specific performance, irrespective of the consideration whether such contracts were legally binding or not.(i)

§ 270. One considerable class of cases in which the court has refused to grant specific performance on the score of unfairness and hardship, arises on contracts for the sale of reversionary interests. The court, considering that a man possessed only of a future interest sells at a disadvantage, has always refused specific performance of contracts by heirs

(d) *Dean of Ely v. Stewart*, 2 Atk. 44.

(e) *Talbot v. Ford*, 13 Sim. 173.

(f) *Hamilton v. Grant*, 3 Dow, 33, 47.

(g) *Kimberley v. Jennings*, 6 Sim. 340; this case has been overruled, but on another point, by *Lumley v. Wagner*, 1 De G. M. & G. 604.

(h) *Denne v. Light*, 26 L. J. Ch. 459; S. C. 3 Jur. N. S. 627, (L. J. J.)

(i) *Shrewsbury and Birmingham Railway Company v. London and North-western Railway Company*, 4 De G. M. & G. 115; S. C. 6 Ho. Lords, 113.

for the sale of such estates at an under-value :^(k) and moreover has thrown the onus of proving that *the transaction was for a full consideration, and in all respects fair, on the purchaser asking for the assistance of the court.^(l)

§ 271. The principle on which the court acts in these cases being that a man possessed only of a future interest sells at a disadvantage, it will not apply where the tenant for life and the reversioner concur, as they together "form a vendor with a present interest;"^(m) and so where a vendor had a rent charge of £500 in possession and an estate in reversion, and he sold a perpetual rent charge of £500, he was not considered as within the principle now under consideration, he having it in his power to secure a perpetual rent charge of that amount in possession.⁽ⁿ⁾

§ 272. The mere fact however that some interest in possession is sold together with the reversion, will not, at least where that is not considerable, take the case out of the rule ;^(o) as for instance, where an annuity in possession was sold together with the reversion, the estimated value of the annuity being only about one-sixth of that of the reversion.^(p)

§ 273. Again, the principle will not apply where the reversionary interest has been sold by auction ;^(q) and this for two reasons. For first "there being no treaty between vendor and purchaser, there can be no opportunity for fraud or imposition on the part of the purchaser. The vendor is in no sense in the power of the purchaser."^(r) Secondly, it being now clearly established that the market price of the reversionary interest, and not the estimate of actuaries, is the criterion by which the court will decide the question of undervalue ;^(s) and a sale by auction being *a mode of ascertaining that market price, it follows that [*126] the consideration of the transaction and the value in the eye of the court must in such cases be one and the same, and that, in the absence of fraud, no question of undervalue can arise.

§ 274. The principles of the court in respect of sales of reversionary interests have been very extensively discussed in suits for the rescission of such sales : I shall not here enter at any further length upon them, but it remains only to remark, that whatever circumstances have been held to justify the rescission of such sales when executed, will *à fortiori* furnish a vendor placed in the position of defence with a ground for resisting the execution of a contract resting *in fieri*.

(k) *Playford v. Playford*, 4 H. 546.

(l) *Kendall v. Beckett*, 2 R. & M. 88 ; *Hincksman v. Smith*, 3 Russ. 433.

(m) *Wood v. Abrey*, 3 Mad. 417. (n) *Wardle v. Carter*, 7 Sim. 490.

(o) Per Lord Eldon in *Davis v. Duke of Marlborough*, 2 Sw. 154.

(p) *Earl of Portmore v. Taylor*, 4 Sim. 182.

(q) *Shelly v. Nash*, 3 Mad. 232. (r) Per Sir J. Leach, id. 236.

(s) *Wardle v. Carter*, 7 Sim. 490 ; per Wigram, V. C., in *Barell v. Dann*, 2 H. 452 ; *Earl of Aldborough v. Trye*, 7 Cl. & Fin. 436, particularly 460 ; *Edwards v. Burt*, 2 De G. M. & G. 55.

*CHAPTER VII.

[*127]

OF INADEQUACY OF THE CONSIDERATION.

§ 275. WE now proceed to inquire how far the inadequacy of the consideration for a contract may furnish a defence against its specific performance. The inadequacy may, it is evident, in contracts for sale be either on the side of the vendor or of the purchaser; either in the purchase-money or in the thing sold: or again in other cases, it may consist in the inequality of the contingencies to which the contract has reference.(a)

§ 276. It has been justly remarked that there is a great difference between the defence grounded on the inadequacy of purchase money set up by the vendor, and on the excess of it set up by the purchaser; for whilst the court can ascertain the former by a reference to the general market value of such property, it has no satisfactory means of determining what represents the money value to a specified individual of a specified estate.(b)

§ 277. There is no doubt that inadequacy of consideration when combined with any case of fraud, misrepresentation, studied suppression of the true value of the property,(c) or with any circumstances of oppression, or even of ignorance,(d) is a most material ingredient in the case, as affecting the discretion of the court in granting specific *performance ; and further it may materially concur in constituting a [*128] case for setting aside a transaction. Thus in Cockell v. Taylor,(e) the present master of the rolls set aside an alleged sale of land to the plaintiff, where the consideration was about ten times the value of the land,—the purchase having been made the condition of a loan which the plaintiff was very anxious to negotiate in order to prosecute his claim in chancery to some valuable property, and he being in humble circumstances and illiterate. “Coupled with such circumstances,” said Sir John Romily, “the evidence of over-price is of great weight, and if the case had stood here I should have been of opinion that this transaction was one which could not stand.”(f) It may also concur with other circumstances to show that the transaction was in the nature of a gift, and not of a contract for sale, in respect of which therefore the court would not interfere, as it does not decree the specific performance of incomplete gifts.(g)

§ 278. The question however which has been principally discussed is the effect on contracts of the inadequacy of consideration taken by itself and abstracted from all other circumstances.

§ 279. With regard to it as a ground for the setting aside of transactions, the doctrine of the court is that inadequacy of consideration, if only amounting to hardship or even great hardship, is no ground for relieving a man “from a contract which he has wittingly and willingly

(a) Hamilton v. Grant, 3 Dow, 33.

(b) Dart, Vend. 578.

(c) Deane v. Rastron, 1 Ans. 64.

(d) Young v. Clarke, Prec. Ch. 538; Lewis v. Lord Lechmere, 10 Mod. 503.

(e) 15 Beav. 103.

(f) p. 115.

(g) Callaghan v. Callaghan, 8 Cl. & Fin. 374.

entered into;”^(h) but that it may be so enormously great as to be a conclusive evidence of fraud, and that it is then a ground for setting aside the transaction affected by it.⁽ⁱ⁾

§ 280. Regarded as a ground of defence to a specific performance, the doctrine of the older cases was that it was *sufficient, it being regarded, even where not amounting to evidence of fraud, as a circumstance of hardship which would stay the interposition of the court. Thus, in a case,^(k) before Chief Baron Eyre, that judge laid it down that, independently of all consideration of fraud, “the court upon the mere consideration of its being so hard a bargain will not enforce it.” So, in a case^(l) where there was an agreement between two men *sui juris* for the sale of an estate worth £10,000 for £6000 down and £14,000 more, payable at the death of a man aged sixty-four or sixty-five and there were no circumstances of pressure or circumvention, Lord Alvanley refused, on a cross-bill, to set aside the agreement; but he also refused specific performance of it on the ground of its being a hard bargain. And in an earlier case, where a purchaser had, during the South Sea mania, purchased a house from the court for £10,500, and paid a deposit of £1000, the purchaser was discharged by Lord Macclesfield, on forfeiting his deposit, on the ground of the general delusion which the nation was under at the time of the contract, and the imaginary values then put by people on estates, and this in spite of a most able argument by Lord Nottingham who argued on behalf of his granddaughters, the plaintiffs.^(m)

§ 281. But it seems now to be established by the decisions of Lord Eldon and Sir William Grant, that mere inadequacy of consideration is no defence to specific performance, unless it amount to an evidence of fraud, and so would furnish a ground even for cancelling the contract.⁽ⁿ⁾ “Unless the inadequacy of price,” said Lord Eldon in one case,^(o) “is such as shocks the conscience and amounts in itself to conclusive and decisive evidence of fraud in the *transaction, it is not itself a sufficient ground for refusing a specific performance.” And in an earlier case,^(p) where a sale by auction having taken place for about half the value of the estate, Lord Rosslyn had refused specific performance, but Lord Eldon, on a re-hearing, although he ultimately decided the case on a question of evidence, doubted the principle of the decree, and expressed an opinion that a sale by auction could not be set aside for mere inadequacy of price. His lordship also applied the same principle in the instance of an annuity transaction.^(q) The doctrine was adopted by Sir William Grant and Lord Erskine, and is now the well-established principle of the court.^(r) A recent illustration of it may be

(h) *Griffith v. Spraltey*, 1 Cox, 383, 388, 389; *Fox v. Mackreth*, 2 Dick. 683.

(i) *S. C. Stilwell v. Wilkins*, Jac. 280.

(k) *Tilly v. Peers*, cited by Sir S. Romilly, arg. 10 Ves. 301.

(l) *Day v. Newman*, 2 Cox, 77; S. C. cited by Sir S. Romilly, arg. 10 Ves. 300.

(m) *Savile v. Savile*, 1 P. Wms. 745; S. C. 5 Vin. Abr. 516, pl. 25.

(n) Per Lord Eldon in *Stilwell v. Wilkins*, Jac. 282.

(o) In *Coles v. Trecothick*, 9 Ves. 246. (p) *White v. Damon*, 7 Ves. 30.

(q) *Underhill v. Horwood*, 10 Ves. 209.

(r) *Burrowes v. Lock*, 10 Ves. 470; per Lord Erskine in *Lowther v. Lowther*, 13 Ves. 103; *Collier v. Brown*, 1 Cox, 428; *Bower v. Cooper*, 2 Ha. 408; *Borell*

found in the case of *Abbott v. Swarder*,^(s) where an estate was bought for £5000, the value of which was considered by the Vice-Chancellor Knight Bruce, to be £3,500; but this inadequacy of consideration was held, both by him and by Lord St. Leonards, to be no bar to specific performance, which was accordingly decreed at the suit of the vendor.

§ 282. It being established by other cases that, in a general way, the hardship of a bargain is, independently of fraud, a ground for refusing its specific execution; and it being evident that the inadequacy of consideration, even where not amounting to evidence of fraud, may yet amount to evidence of such hardship, the reason of the rule above stated is not at first sight obvious. It is probably, however, to be sought for in the extreme difficulty of measuring such hardship,—in the great variety of *feelings and motives by which men are actuated in their contracts, and in the corresponding variety of opinions which may [*_131] be formed as to the inadequacy of the consideration of these contracts, except in those extreme cases where it is said to shock the conscience, and so to be in itself a badge and evidence of fraud.

§ 283. By the Roman law, these difficulties in the way of relieving against inadequacy of consideration in certain cases were overcome, at least as to immovable property, by the fixing of the arbitrary standard of half the real price as that which would give the sufferer a right to the interference of the law: when the price paid did not amount to half the real value of the thing sold, the vendor might put the purchaser to his election, either to take back the purchase-money and restore the thing sold, or to keep the thing, and make up the deficiency in the purchase-money.^(t) The French law adopted the same principle, except in the case of sales between co-heirs and co-proprietors, where a defect of one quarter of the price had the same effect as a like defect of one-half in other cases.^(u) A wish has been expressed that the same principle had been adopted by the law of this country.^(v)

§ 284. The question of the inadequacy of the consideration must of course be decided at the time of the contract, and not by the light of subsequent events. It is true that, in a case^(w) already stated, the circumstance of the contract having been made during the excitement caused by the South Sea scheme, was allowed as a reason why the court relieved a purchaser from the performance of his contract; but the case is one which cannot now be considered as law, and the principle involved seems unjust. It is now *therefore well established that the time [*_132] of the contract is the time for judging of its consideration: thus, to give one example,—where an annuity for life forms part of the con-

v. *Dann*, 2 Ha. 450. See also *Griffith v. Spraltey*, 2 Bro. C. C. 179; *S. C.* 1 Cox, 383; *Stephens v. Hotham*, 1 K. & J. 571.

(s) 4 De G. & Sm. 448.

(t) *Cod. lib. iv. tit. 44, 2.*

(u) *Pothier, Tr. des Oblig. p. i. ch. i. s. 1, art. 3, § 4.*

(v) *Nott v. Hill*, 2 Cas. in Ch. 120.

(w) *Savile v. Savile*, ante, § 280. See *Kien v. Stukeley*, 1 Bro. P. C. 191, where the same ground was urged; but according to the report in *Gilbert*, the case was decided on another point.

sideration, and the life drops before any payment is made, this does not render the consideration necessarily inadequate.(x)

§ 285. The question of inadequacy of consideration in cases of sales of reversionary interests is governed by principles peculiar to those cases : the proof of adequacy being thrown on the purchaser, and not that of inadequacy on the vendor. The subject is briefly referred to elsewhere.(y)

[*133]

*CHAPTER VIII.

OF WANT OF MUTUALITY IN THE CONTRACT.

§ 286. A CONTRACT, to be specifically enforced by the court, must be mutual,—that is to say, such that it might, at the time it was entered into, have been enforced by either of the parties against the other of them. Whenever, therefore, whether from personal incapacity, the nature of the contract, or any other cause, the contract is incapable of being enforced against one party, that party is equally incapable of enforcing it against the other, though its execution in the latter way might in itself be free from the difficulty, attending its execution in the former.

§ 287. Thus, a tenant in tail cannot enforce an agreement entered into by a tenant for life, because the tenant in tail could not be sued on that agreement : (a) an infant cannot sue, because he could not be sued, for a specific performance ?(b) a purchaser from a person who at the time of the sale had no estate in the property sold, may defend himself on the score of the vendor's original incapacity to perform his part : (c) and where

[*134] A. agreed with B. not to *join in barring an entail, and B. agreed to convey to A. certain parts of the estate on his entering into possession, and it was held, on the authority of *Collins v. Plummer*,(d) that such an agreement could not be specifically enforced against A., a specific performance of B.'s part of the agreement was refused at the suit of A.'s representatives.(e) So where the relief sought was analogous to the specific performance of a grant of an office, the court held that, the duties and services incident to the office being personal and confidential in their character, specific performance could not have been decreed against the plaintiff at the suit of the defendant ; and consequently, that the plaintiff could not sue the defendant, though there was no personal duties to be performed by the defendant.(f) And so where the plain-

(x) *Mortimer v. Capper*, 1 Bro. C. C. 156.

(y) *Ante*, § 270.

(a) *Armiger v. Clarke*, Bunn. 111; *Ricketts v. Bell*, 1 De G. & Sm. 335.

(b) *Flight v. Bolland*, 4 Russ. 298. The case of *Clayton v. Ashdown*, 9 Vin. Abr. 393, may perhaps be explained on the ground of a ratification by the infant after attaining his majority, or as being an application in equity of the legal principle that the contract, though voidable by the infant, binds the party of full age. The infant cannot recover a deposit paid on the contract, except on the ground of fraud. *Wilson v. Kearse, Peake, Add. Cas.* 196.

(c) *Hoggart v. Scott*, 1 R. & My. 293.

(d) 1 P. Wms. 104.

(e) *Hamilton v. Grant*, 3 Dow, 33.

(f) *Pickering v. Bishop of Ely*, 2 Y. & C. C. 249.

tiffs had agreed to perform certain services in working a railway, which were of such a confidential nature that the court could not have enforced them if the defendants had sued the plaintiffs,—and the defendants were to pay money, and do nothing else; the court refused specific performance, on the ground, amongst others, of want of mutuality.(g)

§ 288. A doubt was at one time entertained whether there existed the proper mutuality between a person having entered into a contract to take a lease from a tenant for life, with a leasing power and the remainderman :(h) but that *doubt is now resolved, and it seems clear that [*135] such a contract may be enforced by either of the parties to it.(i)

§ 289. The mutuality of a contract is, as we have seen, to be judged of at the time it is entered into; so that it is no objection to the plaintiff's right, that the defendant may by delay, or other conduct on his part subsequent to the contract, have lost his right against the plaintiff.(k) And accordingly it has been held to be no defence on the part of a railway company, for them to show that they had after the contract suffered the time during which, by their statutory powers, they could purchase the lands to expire :(l) if such a defence were sustained, it would be to allow defendants to take advantage of their own neglect.

§ 290. The exceptions and limitations to the doctrine of mutuality may now be considered.

§ 291. (1) The contract may be of such a nature as to give a right to the performance to the one party which it does not give to the other,—as for instance, where a lessor covenants to renew upon the request of his lessee :(m) or where the agreement is in the nature of an undertaking.(n) But the more accurate view of such cases as the first, perhaps of all that could be treated as wanting mutuality, seems to be that they are conditional contracts: and when the condition has been made absolute, as for instance, in the case above stated, by a request to renew, they would seem to be mutual and capable of enforcement by either party alike.

§ 292. In cases arising out of such contracts, the court *will [*136] exercise its discretion as to specific performance with great care,

(g) *Johnson v. Shrewsbury and Birmingham Railway Company*, 3 De G. M. & G. 914; *Stocker v. Wedderburn*, 3 K. & J. 393; *Ord v. Johnston*, 1 Jur. N. S. 1063, (*Stuart, V. C.*) See also *Hill v. Gomme*, 1 Beav. 540; *Bromley v. Jefferies*, 2 Vern. 415, sed qu.; but see per Sir J. Romilly in *Hope v. Hope*, 22 Beav. 364; also S. C. before L. J. J. 26 L. J. Ch. 417; *Vansittart v. Vansittart*, 4 K. & J. 62. It has been decided in Ireland that a contract by a purchaser with a husband and wife is not bad for want of mutuality, and may be enforced by them. *Fenelly v. Anderson*, 1 Ir. Ch. R. 706. The grounds of this decision do not appear very conclusive.

(h) *Per De Grey, C. J.*, in *Campbell v. Leach*, Ambl. 749.

(i) *Shannon v. Bradstreet*, 1 Sch. & Lef. 52, particularly 64.

(k) *South-eastern Railway Company v. Knott*, 10 Ha. 122.

(l) *Hawkes v. Eastern Counties Railway Company*, 1 De G. M. & G. 737, 755; S. C. 5 Ho. Lords, 331, 365. The observations of Lord Cranworth in *Stuart v. London and North-western Railway Company*, 1 De G. M. & G. 721, to the contrary, may probably be taken to be overruled by his lordship's concurrence in Hawkes's case in the house of lords.

(m) *Chesterman v. Mann*, 9 Ha. 206. See *Bell v. Howard*, 9 Mod. 302, 304. See ante, § 186.

(n) *Palmer v. Scott*, 1 R. & My. 391.

and, it seems, view, even somewhat narrowly, the conduct of the party claiming the benefit of his unilateral right to enforce the contract.(o)

§ 293. (2) Mutuality may be waived by the subsequent conduct of the person against whom the contract could not originally have been enforced: thus, where a purchaser contracts for an estate with a person having no title, or not such as he affects to sell, and the contract therefore is not mutual, for want of interest in the vendor; yet if the purchaser investigate the title, and make requisitions, or concur in proceedings for the purpose of remedying the defect, he is afterwards precluded from setting up the original want of mutuality in the contract.(p)

§ 294. And so where, from the relation of the parties to one another, the contract is originally binding on the one and not on the other, the latter may by suit waive that want of mutuality, and enforce the specific performance of the contract; as in the case of a suit by a *cestui que* trust against his trustee for the performance of a contract for sale, such a contract being originally binding on the trustee, and not on the beneficiary.(q) The case of a contract for sale by a voluntary settlor is similar, for though he is incapable of enforcing the contract on the purchaser,(r) the purchaser may waive the want of mutuality and enforce it on him.(s)

§ 295. (3) Another exception to the principle in question is afforded by the doctrine which was established very soon after the passing of the Statute of Frauds, that in case of agreements which by that statute are required to be in writing, a party who has not signed the agreement may enforce it against one who has.(t)

*§ 296. It has been alleged in support of this doctrine, in [*137] the first place, that the statute only requires the agreement to be signed by the party to be charged therewith, or his agent, and is silent as to the signature of the other party.(u) But this reasoning seems inconclusive, because the doctrine of mutuality is over and above, and quite independent of, the Statute of Frauds: that statute may be satisfied, and the doctrine in question remain unsatisfied.(v)

§ 297. A more satisfactory reason which has been alleged is that, by filing the bill, the plaintiff has waived the original want of mutuality, and rendered the remedy mutual.(w)

§ 298. On the same grounds, an agreement contained in a deed-poll

(o) *Chesterman v. Mann*, ubi sup.

(p) *Salisbury v. Hatcher*, 2 Y. & C. C. C. 54; *Hoggart v. Scott*, 1 R. & My. 293.

(q) *Ex parte Lacey*, 6 Ves. 625.

(r) *Smith v. Garland*, 2 Mer. 123; *Johnson v. Legard*, T. & R. 281.

(s) *Buckle v. Mitchell*, 18 Ves. 100.

(t) *Hatton v. Grey*, 5 Vin. Abr. 525, pl. 4, in 36 Car. ii.; S. C. 2 Cas. in Ch. 164; *Brockhouse v. Crosby*, 2 Eq. Cas. Abr. 32, pl. 44; and see, as to the nature of the interest in the party who has not signed, *Morgan v. Holford*, 1 Sm. & Gif. 101; and see post, § 346.

(u) *Coleman v. Upcot*, 5 Vin. Abr. 527, pl. 17; *Child v. Comber*, 3 Sw. 423, n.; *Backhouse v. Mohun*, id. 434, n.; *Seton v. Slade*, 7 Ves. 265; *Lord Ormond v. Anderson*, 2 Ball & B. 363.

(v) See per Sir J. Leach in *Boys v. Ayerst*, 6 Mad. 323.

(w) *Child v. Comber*, *Seton v. Slade*, ubi supra; *Fowle v. Freeman*, 9 Ves. 351; per Sir W. Grant in *Western v. Russell*, 3 V. & B. 192; *Martin v. Mitchell*, 2 J. & W. 413; *Flight v. Bolland*, 4 Russ. 298.

was enforced, notwithstanding an objection which was taken from the unilateral nature of the instrument.(x)

§ 299. (4) Where the vendor has not substantially the whole interest he has contracted to sell, he cannot enforce the contract against the purchaser, and yet the purchaser can insist on having all that the vendor can convey, with a compensation for the difference. "If," said Lord Eldon,(y) "a man, having partial interests in an estate, chooses to enter into a contract, representing it, and agreeing to sell it as his own, it is not competent to him afterwards to say, though he has valuable interests, that he has not the entirety, and therefore the purchaser shall not have the benefit of his contract. For the purpose of this jurisdiction, the person contracting under those circumstances is *bound by the assertion in his contract; and if the vendee chooses to take as [*138] much as he can have, he has a right to that, and to an abatement; and the court will not hear the objection by the vendor, that the purchaser cannot have the whole."(z) This principle was acted on by Lord Nottingham, in the case of Cleaton v. Gower,(a) where the defendant, Gower, was tenant for life of certain estates in Shropshire, and he and his late father agreed with the plaintiff that the plaintiff should open and work certain mines, and should enjoy the minerals raised for ten years, if the defendant or his issue male should so long live, at a yearly rent of £25. The plaintiff sought a specific performance of this agreement: the defendant objected that he was only tenant for life, and subject to account for waste, and that he could not execute the agreement because it was inconsistent with his power: but the court decreed the defendant to execute the agreement so far as he was capable of doing it, and likewise to satisfy the plaintiff such damages as he had sustained in not enjoying the premises according to the agreement. The principle is also well illustrated by Lord Bolingbroke's case,(b) before Lord Thurlow: the incumbent of a living had contracted with a tenant in remainder for the purchase of the advowson, and on the faith of the contract had built a much better house on the glebe than he would otherwise have done: the tenant for life refusing to concur in the sale, Lord Thurlow compelled the tenant in remainder to convey a base fee by levying a fine, with a covenant to suffer a recovery on the death of the tenant for life.

*§ 300. Considerable doubt was unquestionably thrown on [*139] this principle by Lord Redesdale, in two cases which came before him as lord chancellor of Ireland. In one of these cases,(c) a tenant for life entered into an agreement with the plaintiff to grant a lease,

(x) *Otway v. Braithwaite*, Finch, 405. So also of a bond, *Butler v. Powis*, 2 Coll. C. C. 156.

(y) In *Mortlock v. Buller*, 10 Ves. 315.

(z) See accordingly *Attorney-General v. Day*, 1 Ves. Sen. 224; *Milligan v. Cooke*, 16 Ves. 1; *Dale v. Lister*, 16 Ves. 7; *Hill v. Buckley*, 17 Ves. 394; *Western v. Russell*, 3 V. & B. 187; *Neale v. Mackenzie*, 1 Ke. 474; *Bennett v. Fowler*, 2 Beav. 302; *Sutherland v. Briggs*, 1 Ha. 26, particularly 34; *Wilson v. Williams*, 3 Jur. N. S. 816, (Wood, V. C.)

(a) Finch, 164.

(b) 1 Sch. & Lef. 19, n., quoted by Lord Cottenham in *Great Western Railway Company v. Birmingham and Oxford Junction Railway Company*, 2 Phil. 605.

(c) *Lawrenson v. Butler*, 1 Sch. & Lef. 13.

which he could not do without the consent of trustees : the consent was refused, the agreement being in fact intended to give a fine to the tenant for life in fraud of the power : the intended lessee filed his bill against the tenant for life, and contended that he was at least entitled to such a lease as the tenant for life could grant out of his estate. But Lord Redesdale dismissed the bill for want of mutuality. "No man," he said,^(d) "signs an agreement but under a supposition that the other party is bound as well as himself : and therefore if the other party is not bound, he signs it under a mistake ;" and his lordship considered that the principle above stated only applies where, on the faith of an agreement, one party has put himself in a situation from which he cannot extricate himself, and is therefore willing to forego part of his agreement,—where an injury would be sustained by the plaintiff, unless he were to get such an execution of the contract as the defendant could give. In the other case,^(e) which came before Lord Redesdale, he further observed upon the specific performance of contracts by a tenant for life exceeding his power. "I think," said his lordship,^(f) courts of equity should never enforce such contracts, whether with a view to the party himself or to the person entitled in remainder. In the first place, it is unconscionable in the tenant for life to execute such a lease, because it brings an incumbrance on the estate of the remainderman, and puts him to litigation to get rid of it : and as to the tenant for life himself, [*140] it is compelling him to do what is to be the foundation of *a future action for damages, if he die before the twenty-one years. The court will never do this, but will leave the party at once to bring his action for damages. And I also conceive that this sort of contract, obtained by a person who knew at the time the nature of the title, is unconscionable in him, as he makes himself a party knowingly to that which is a fraud on the remainderman ; and, under such circumstances, he has no claim to the assistance of a court of equity.

§ 301. This view of the jurisdiction is certainly narrower than that entertained by previous judges : it has been remarked to be such by Lord Langdale,^(g) and has been disapproved of by Lord St. Leonards. "I doubt," said his lordship,^(h) speaking of Lord Redesdale's dismissal of the bill in the first of the cases above alluded to, "whether that can be maintained as the law of the court where there is no fraud in the transaction. If there be a *bona fide* intention to execute the power, and the contract cannot be carried into effect, I do not see why the interest of the tenant for life should not be bound to the extent he is able to bind it, unless there be some inconvenience."

§ 302. It is obvious that, in thus proceeding to give the purchaser an estate different from that which the vendor contracted to sell, the court is executing the contract *ex pres*, or rather, perhaps, is carrying into effect a new contract,—a course in which difficulties will necessarily

^(d) p. 21.

^(e) Harnett v. Yielding, 2 Sch. & Lef. 549 ; contra Neale v. Mackenzie, 1 Ke. 474.

^(f) p. 559. See also p. 553.

^(h) In Dyas v. Cruise, 2 Jon. & Lat. 460, 487.

^(g) In Thomas v. Dering, 1 Ke. 746.

sometimes arise ; and these put restrictions on the jurisdiction under discussion. These seems to be the following.

§ 303. (1) Where the difference in value of the interest contracted for, and the interest actually to be conveyed, is incapable of computation. Thus, in a case where the vendor contracted to convey the fee, and the interest which he could convey was a life estate and an ultimate reversion in fee in default of issue male, specific performance was *refused on this ground :⁽ⁱ⁾ and in another case, where compensation was asked for the difference between arbitrary and fixed fines, the former being susceptible of variation as the estate increased in value, Lord Cottenham considered it impossible to compute it, and that a reference to the master to compute it was accordingly erroneous.^(k) In these cases, the purchaser might of course take the vendor's interest, if he chose, without compensation.

§ 304. (2) Nor will the rule apply where the alienation of the partial interest of the vendor might prejudice the rights of third persons interested in the estate ; so where a tenant for life, without impeachment of waste, under a strict settlement, had contracted for the sale of the fee, the court refused to compel him to alienate his life interest, on the ground that a stranger would be likely to use his liberty to commit waste in a manner different from a father, and more prejudicial to the rights of those in remainder.^(l)

§ 305. (3) In *Wheatley v. Slade*,^(m) the vice-chancellor of England held that the principle did not apply where a large part of the property cannot be conveyed ; and consequently where there was a contract for the sale of a lace manufactory, and it turned out that the vendor was only entitled to nine-sixteenths of the whole, and that those parts were subject to a debt which would exhaust nearly the whole of the purchase-money, he refused specific performance. But in cases where there is a great difference between the property supposed to be sold and that which the vendors can convey, the court will, notwithstanding this circumstance, *enforce the agreement where it sees that the intention of the contract is the sale of whatever interest the vendor has. Thus, where vendors who had only two twenty-first parts contracted to sell two sixth parts with all other their rights and interests in the property, the contract was enforced. Such a case is very different from a contract for the sale of an entirety where the vendor is only owner of part.⁽ⁿ⁾

§ 306. (4) It is perhaps questionable whether in any case in which the purchaser is aware of the vendors incapacity to convey the whole of what he contracts for, he can claim to have what the vendor can

(i) *Thomas v. Dering*, 1 Ke. 729. See also *Graham v. Oliver*, 3 Beav. 124.

(k) *White v. Cuddon*, 8 Cl. & Fin. 766 ; reversing S. C. in Ex. 4 Y. & C. Ex. 25. See also *infra*, § 813 et seq.

(l) *Thomas v. Dering*, 1 Ke. 729, quoted in *Wythes v. Lee*, 3 Drew, 396. See also *Graham v. Oliver*, 3 Beav. 124 ; cf. *Cleaton v. Gower, Finch*, 164, stated ante, § 299.

(m) 4 Sim. 126. See the observations of Lord St. Leonards on this case, *Vend. & Pur.* 263 ; also *Maw v. Topham*, 19 Beav. 576, where the vendors were only entitled to three-fourths.

(n) *Jones v. Evans*, 17 L. J. Ch. 469.

convey.(o) In a recent case,(p) where the vendors were entitled only to three-fourths of the property, and the purchaser was at the time he filed his bill aware, or had good reason to believe, that no good title could be made to the whole of the premises, the master of the rolls held that though he might probably have recovered damages, yet as he chose to sue for specific performance, he was not entitled to any abatement on the purchase-money, but that he might take without abatement the three-quarters which the vendors could convey. And it seems clear that where the purchaser is privy to an intended fraud on a settlement by the vendor, he cannot claim to have that which the vendor can convey out of his interest: so that where a person has dealt with a tenant for life for a lease, being at the time aware that it would be in excess of the tenant for life's power, and so endeavoured to put a fraud upon the settlement, he will not afterwards be allowed to call for a lease from the tenant for life to the extent of his interest: the agreement was not at the time it was entered into a fair and proper one, and the court therefore will not interfere.(q)

[*143]

*CHAPTER IX.

OF THE ILLEGALITY OF THE CONTRACT.

§ 307. THE illegality of an agreement is of course a bar to its specific performance, as well as to every other proceeding by which either of the parties may seek to enforce it. The interference of the court is prevented, whether the contract were illegal at the time of its being entered into, or was then legal, but has been rendered illegal by subsequent statute law before its execution.(a) But in the latter case the court is, it seems, more anxious to find some means of executing the contract so far as it may be done without violating the law.(b)

§ 308. What constitutes illegality in all the various species of contracts which may exist between man and man is a subject of enormous dimensions, regulated in part by the statute law of the realm, in part by considerations of public policy,(c) and in part even by the rules which the courts have adopted for the general protection of all suitors.(d) It will be needful here only to enter into the subject so far as it peculiarly affects suits for specific performance.

(o) *Beeston v. Stuteley*, 27 L. J. Ch. 156, (Wood. V. C.)

(p) *Maw v. Topham*, 19 Beav. 576. Lord St. Leonards appears to doubt this case, *Vend. & Pur.* 257.

(q) *O'Rourke v. Percival*, 2 Ball & B. 58. See ante, § 300.

(a) *Atkinson v. Ritchie*, 10 East, 530, 534; *Barker v. Hodgson*, 3 M. & S. 267; *Esposite v. Bowden*, 4 Ell. & Bl. 963. See also *Winnington v. Briscoe*, 8 Mod. 51, and post, § 607.

(b) *Bettesworth v. Dean of St. Paul's*, Sel. C. in Ch. 66; post, § 672.

(c) As to this class, see *Egerton v. Lord Brownlow*, 4 Hl. Lords, 1, and the cases there collected.

(d) *Cooth v. Jackson*, 6 Ves. 12.

§ 309. The nature of a defence founded on the illegality *of a contract differs in its nature from most other defences; the objection is rather that of the public speaking through the court than of the defendant as a party to the contract. The law disallows all proceedings in respect of illegal contracts, not from any consideration of the moral position and rights of the parties, but upon grounds of public policy. For if A. and B. enter into a contract for some illegal end to which both are alike privy, and A. do his part in the business, B. has, it seems, no moral right to refuse performance of his part, provided there be nothing immoral in that part abstracted from the general end of the contract; as, for instance, if, under an agreement to ship goods contrary to law, A. ship the goods, B. has no ground in natural equity for refusing to pay the stipulated price: A. and B. were equal in the culpability of the contract, but B. does a fresh wrong by refusing payment; (*e*) but it is a wrong for which no remedy is afforded by the law, for *ex dolo malo non oritur actio*. “It is not for his (the defendant’s) sake,” said Lord Mansfield, (*f*) “that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice between him and the plaintiff,—by accident, if I may so say.” Where the defendant has received the benefit of the contract this defence is evidently an unrighteous one, and will accordingly be received by the court with some degree of disfavour. (*g*)

§ 310. The principle on which this defence reposes is shown by the cases on the specific performance of awards; for the illegality of the act directed to be done by the award *will be a ground for refusing specific performance, although the unreasonableness of the act [**145*] would be no ground, it being a decision by the judge chosen by the parties. (*h*) It is further illustrated by this, that where in a suit for specific performance, a fact not put in issue by either party comes out on the evidence affecting the legality of the contract, it will be noticed by the court, which will not proceed without directing an inquiry. (*i*)

§ 311. As to the clearness of the illegality which will be a bar to specific performance, there is perhaps some slight diversity of expression. In *Johnson v. Shrewsbury and Birmingham Railway Company*, (*k*) Lord Justice Knight Bruce laid it down that before the court would enforce the specific performance of an agreement, it must be satisfied that there is not a reasonable ground for contending that the agreement is illegal or against the policy of the law; whilst in a case (*l*) on an agreement by a solicitor retiring from a firm, to allow his name to be used after his

(*e*) There is a difference of opinion amongst the jurists as to the binding nature of the promise in the case above stated, *in foro conscientie*; though all agree that it cannot be enforced. See *Grot. de Jur. Bell. ac Pac. lib. ii. c. xi. s. 9*; *Pothier, Tr. des Oblig. part i. ch. i. sect. 1, art. 3* § 6.

(*f*) In *Holman v. Johnson*, *Cowp. 343*.

(*g*) *Shrewsbury and Birmingham Railway Company v. London and North-western Railway Company*, 16 *Beav. 44*. See also *ante*, § 204.

(*h*) *Wood v. Griffith*, 1 *Sw. 43*.

(*i*) *Parken v. Whitby, T. & R. 366*; *Evans v. Richardson*, 3 *Mer. 469*.

(*k*) 3 *De G. M. & G. 914*. See also *City of London v. Nash*, 3 *Atky. 512*; *S. C. 1 Ves. Sen. 12*.

(*l*) *Aubin v. Holt*, 2 *K. & J. 66*.

retirement, Vice-Chancellor Wood(*m*) observed, “The agreement must be legal or illegal, and it is not within the discretion of the court to refuse specific performance because an agreement savours of illegality. It must be shown to be illegal.”

§ 312. Where a trust is constituted for the performance of a contract in itself incapable of being enforced, and the trust is in itself perfectly lawful and independent of the contract, except so far as that may be necessary to explain the constitution of the trust, there the trust may be enforced, and by means of it the contract specifically performed. This principle was acted on in the case of *Powell v. Knowler*,(*n*) before Sir J. Fortescue, M. R., where A. and B. entered into an agreement for the division of an estate *that was to be recovered, which was in-
[*146] capable of being enforced on the ground of champerty, and the party who, according to the agreement, was to convey part of the estate to the other, by a codicil directed the agreement to be carried out, and created a trust for that purpose; the agreement was specifically enforced against the trustee.

§ 313. The principle of this case is in analogy with that of several other cases. Thus where an act, though the result of an unlawful contract, is itself lawful, it may form the consideration for a lawful agreement, as, for instance, the actual transfer of stock, the agreement to do which was illegal.*(o)* Similarly, a trustee into whose hands money is paid on account of a third person, cannot set up the illegality of the trust under which the money was so paid, though the *cestui que* trust could not have enforced his right against the payer directly, as in that case he could have only got at the money through the illegal agreement.*(p)*

[*147]

*CHAPTER X.

OF THE CONTRACT BEING ULTRA VIRES.

§ 314. CORPORATIONS created for special purposes have a power to contract, but within certain limits only, and all contracts in excess of their powers, or *ultra vires*, are void, and therefore necessarily incapable of being enforced either at law or in equity. This subject has recently undergone great discussion in respect of contracts by railway companies.

§ 315. A contract entered into by such a corporation in the proper form is *prima facie* good, and the onus lies on the party alleging it to be void to show that it is in excess of the company's powers, and not on the party relying on it to show that the corporation was authorized to do it. Corporations have at law a power to enter into all contracts not expressly or impliedly prohibited;(*a*) and therefore all corporate bodies are *prima*

(m) p. 70.*(n)* 2 Atky. 224.*(o)* *M'Callan v. Mortimer*, 9 M. & W. 636.*(p)* *Thomson v. Thomson*, 7 Ves. 470; *Tenant v. Elliott*, 1 B. & P. 3.*(a)* Per Erle, J., in *Mayor of Norwich v. Norfolk Railway Company*, 4 Ell. & Bl. 397, 413.

facie bound by contracts under their corporate seals; "but this *prima facie* right," said Lord Cranworth, (b) "does not exist in any case where the contract is one which, from the nature and object of incorporation, the corporate body is expressly or impliedly prohibited from making." "Where a corporation," said Lord Wensleydale, (c) "is created by an act of parliament for *particular purposes, with special [*148] powers, their deed, though under their corporate seal, and that regularly affixed, does not bind them, if it appears, by the express provisions of the statute creating the corporation, or by necessary or reasonable inference from its enactments, that the deed is *ultra vires*, that is, that the legislature meant that such a deed should not be made."

§ 316. In the case of the Shrewsbury and Birmingham Railway Company v. London and North-western Railway Company, (d) the agreement between the companies was briefly to the effect that the North-western Company should give up to the Shrewsbury Company seven-thirteenths of the profits of the carriage of passengers and goods over a part of the North-western line, in consideration of receiving, in return, six-thirteenths of the profits made by the Shrewsbury company on a certain portion of their line. In the course of the protracted litigation which arose out of this agreement, opposing opinions were given by the highest authorities as to whether it was *ultra vires* or not, Lord Cottenham and the Queen's Bench inclining to the opinion of its validity, and Lord Justice Turner and Lord Cranworth, sitting in the house of lords, leaning strongly to the opinion that it was in excess of the powers of the companies. If such an agreement was valid as to part of the line, why is it not valid as to the whole? and if so, there would be no impediment, it was urged, to two companies bringing their funds into a common stock, and dividing them amongst their shareholders in any stipulated proportion.

§ 317. In the case of the South Yorkshire Railway and *River Dun Company v. Great Northern Railway Company, (e) the plain-[*149] tiffs sued on a deed which carried out an arrangement come to by the two companies, by which the Great Northern Railway Company was to be allowed to use the line of the other company for the purpose of carrying coal from the field intersected by it, and thence on to their own line, on payment to the South Yorkshire Company of sums which should, together with the profits of that company, enable them to pay their proprietors dividends varying according to the quantity of coal carried by the Great Northern Company over their line; the argument turned mainly upon the effect of the 87th section of the Railway Clauses Consolidation Act, 1845, by which railway companies are enabled to contract

(b) In Shrewsbury and Birmingham Railway Company v. North-western Railway Company, 6 Ho. Lords, 135, 136.

(c) In South Yorkshire Railway and River Dun Company v. Great Northern Railway, 9 Exch. 84.

(d) Before Lord Cottenham, 2 M^cN. & G. 324; before Lord Truro, 3 M^cN. & G. 70; before Q. B. 17 Q. B. Rep. 652; before Sir John Romilly, 16 Beav. 441; before the Lords Justices, 4 De G. M. & G. 115, and in D. P. 6 Ho. Lords, 113; and see Lancaster and Carlisle Railway Company v. North-western Railway Company, 2 K. & J. 293.

(e) 9 Ex. 55.

with one another for the passage over their lines of wagons, upon payment of such tolls and under such conditions as may be agreed on. The court was divided in opinion, Martin, B. holding the contract to be *ultra vires*; Platt, B. and Lord Wensleydale holding it to be binding. Lord Wensleydale held it to be good, because, on his view of the statutory powers of the company, they did not appear to be restrained from entering into such a contract as that sued on; he thought that they certainly were not so restrained; at any rate it was far from clear that they were, and the contract being *prima facie* good, and it not being made out that the act prohibited such a bargain, the contract must be enforced.(f) The decision of the majority of the court in favour of the validity of the contract was affirmed in the exchequer chamber.(g)

§ 318. We will now consider rather more precisely what contracts are by implication prohibited; for as to those expressly prohibited, little question is likely to arise.

§ 319. In the first place, it seems perfectly clear that any intentional [*150] use of the powers of the corporation to *defeat the objects of the corporation must be prohibited by implication.(h)

§ 320. Again, such a corporation cannot engage in objects foreign to the objects and purposes of their corporation, as for example carrying on a trade not contemplated by the act; and it is immaterial whether such objects be profitable to the company or not, and whether they be approved by the shareholders or not: a railway company incorporated by act of parliament is bound to apply all its funds for the purposes provided by its act, and for no other. This was established in the case of the East Anglian Railway Company v. Eastern Counties Railway Company,(i) where it was held that no action could be maintained on a covenant by the defendants to pay to the plaintiffs the costs incurred in applications to parliament by the plaintiffs, at the instance of the defendants, for obtaining powers which the defendants considered it desirable for their interests that the plaintiffs should possess. This case has been followed by Maegregor v. The Official Manager of the Dover and Deal Railway Company,(k) and by Gage v. Newmarket Railway Company,(l) and has been fully recognized by Lord Cranworth in the house of lords.(m)

§ 321. The general doctrine now before us was very much ventilated in the case of the Mayor of Norwich v. Norfolk Railway Company.(n) There the railway company, being authorized by statute to make a railway between certain termini, crossing the river Yare at a specified place, found difficulties in effecting their crossing there, and had, with the [*151] assent of the admiralty and of the proprietors, *made a pier in another part of the river, with the intention of carrying the rail-

(f) p. 88.

(g) 9 Ex. 643.

(h) Per Erle, J., in Mayor of Norwich v. Norfolk Railway Company, 4 Ell. & Bl. 397, 413.

(i) 11 C. B. 775; S. C. 7 Rail. C. 150.

(k) 18 Q. B. 618; S. C. 7 Rail. C. 227.

(l) 18 Q. B. 457.

(m) In Eastern Counties Railway Company v. Hawkes, 5 Ho. Lords, 347. See also Bostock v. North Staffordshire Railway Company, 4 Ell. & Bl. 798, particularly the judgments of Wightman and Coleridge, J. J.

(n) 4 Ell. & Bl. 397.

way across at this place: the plaintiffs indicted the defendants for a nuisance; and, for the compromise of these proceedings, it was agreed that the defendants should complete the works in question within a year, in a manner agreed on, so as to protect the navigation, and that, if the works should not be completed within twelve months, the company should pay £1000 as liquidated damages; the plaintiff sued on a deed containing a covenant to this effect. The court was greatly divided in opinion, as to the rights of the plaintiffs; Erle, J., severely criticizing the decision in the East Anglian case, held that the contract was not expressly or impliedly prohibited at law, and was therefore good: Coleridge, J., also held it good, upon a distinction to be hereafter noticed between a purpose not authorized by the incorporation, and unauthorized means of effectuating the authorized purpose; whilst Lord Campbell held the covenant to be bad, as being, on the face of it, and therefore within the knowledge of the covenantee, for the application of the funds to a purpose other than those for which the company was established.

§ 322. The doctrine in question is not carried so far as to forbid the doing of the least thing not expressly mentioned in the act of incorporation: the directors of a company have power to do all such things as are necessary and proper for the carrying out the intention of the act of parliament, though they have no power of doing anything beyond it.(o) It seems, for instance, that a railway company might, without any special authority by statute, lawfully contract for the purchase of a piece of land for the purpose of enlarging a terminus.(p)

§ 323. Mr. Justice Coleridge, in a recent case, drew a *distinction between "a difference of purposes and a difference of [**152] means and modes by and through which the same purpose is to be effected,"(q) and considered that whilst all attempts to carry into effect a foreign purpose are void, the corporation has power to vary the mode by which the given purpose is to be attained; so that, though a company constituted for the purpose of making a railway from A. to B., could not instead thereof make one from C. to D., yet that it might lawfully enter into contracts to effect a deviation in part of its course from that originally specified, that part of the originally designed line having been found impracticable or difficult; and this distinction appears to meet with the approval of Lord St. Leonards.(r)

§ 324. The mere fact that a contract by the directors is *ultra vires*, as between them and the shareholders, does not necessarily disentitle the other party to the contract from suing upon it at law. To do so, it is further necessary that the party suing should have known at the time of the contract that it was intended for a purpose unconnected with the incorporation of the company; but where the nature of the contract shows that it must have been so unconnected, both the parties will be taken to

(o) Per Lord Langdale in *Coleman v. Eastern Counties Railway Company*, 10 Beav. 17.

(p) Per Lord Campbell in *Mayor of Norwich v. Norfolk Railway Company*, 4 Ell. & Bl. 397, 442.

(q) S. C. p. 432.

(r) In *Eastern Counties Railway Company v. Hawkes*, 5 H. & C. 372.

have had this knowledge, and the court will judicially perceive it to be void. Therefore, if a railway company were to contract for a thousand gross of green spectacles, the contract would be necessarily void; but if it were to contract for iron rails, not for the purposes of making the line, but for some other object, the contract would be *ultra vires*, as against shareholders, but might be perfectly good in favour of the other party to the contract.^(s)

[*153] § 325. From this principle it follows that, where a public *company is authorized to take land for extraordinary purposes, a person who agrees to sell his land to this company is not bound to see that it is strictly required for such purposes; but if he acts *bona fide* and without knowledge that the land is not so required, or that the transaction is any misapplication of the funds of the company, the contract is binding in his favour, and may be enforced by him in equity:^(t) and the same seems to hold good where the company, really requiring part of an estate, purchase more than is required.^(u)

§ 326. The cases which have been decided between shareholders and directors, as to transactions beyond the scope of the corporation, will not directly apply to cases between the corporation and third parties, because, in the latter ease, the additional element of the illegality being known to the third party, is to be imported. But with this addition the cases will, it seems, apply, and they will therefore be here briefly alluded to.

§ 327. In *Coleman v. Eastern Counties Railway Company*,^(v) Lord Langdale, at the instance of a shareholder, restrained the application of any part of the funds of a railway company in assisting a company for establishing steam communication between Harwich and the north of Europe, which the directors of the railway company thought would increase their traffic, and thus promote their interests. In *Solomon v. Laing*,^(w) the same learned judge restrained one company from purchasing shares in another. In other cases, railway companies have been restrained from applying any of their resources in promoting a bill to improve [*154] the navigation of a river,^(x) in promoting a branch line,^(y) or *in making a part only of the line when the rest was abandoned;^(z) and the principle has been distinctly recognized by the highest authorities in other cases between a shareholder and the company.^(a)

§ 328. On this principle, corporations will be restrained from expending money in applications to parliament to extend their powers beyond the objects for which they were constituted: thus, in one case, a corporation of a town was restrained from applying to the legislature, at the ex-

(s) Per Lord Campbell and Erle, J., in *Mayor of Norwich v. Norfolk Railway Company*, 4 Ell. & Bl. 397, 415, 443; per Lords Campbell and St. Leonards in *Eastern Counties Railway Company v. Hawkes*, 5 Ho. Lords, 338, 355, 372.

(t) *Eastern Counties Railway Company v. Hawkes*, 5 Ho. Lords, 331, 349, 355.

(u) S. C.

(v) 10 Beav. 1; S. C. 4 Rail. C. 513.

(w) 12 Beav. 339.

(x) *Munt v. Shrewsbury and Chester Railway Company*, 13 Beav. 1.

(y) *Great Western Railway Company v. Rushout*, 5 De G. & Sm. 290.

(z) *Cohen v. Wilkinson*, 5 Rail. C. 741.

(a) *Bagshawe v. Eastern Counties Railway Company*, 6 Rail. C. 152; S. C. 2 M'N. & G. 289; *Beman v. Rufford*, 7 Rail. C. 48, particularly 75; S. C. 1 Sim. N. S. 550.

pence of the borough fund, for a bill to improve a river.(y) But this will not hold where the proceedings are not for the purpose of extending the powers of the corporation, but for defending its existing rights.(z)

*CHAPTER XI.

[*155]

OF THE STATUTE OF FRAUDS AND THEREIN OF PART PERFORMANCE.

§ 329. By the fourth section of the Statute of Frauds(a) it is, amongst other things, enacted that no action shall be brought whereby to charge any person upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized; and by the companies' Clauses Consolidation Act, 1845,(b) sect. 97, any contract which, if made between private parties, would be by law required to be in writing, and signed by the parties to be charged therewith, must, in order to bind the company, be in writing, and signed by two of the directors.(c)

§ 330. It has been decided that this section of the Statute of Frauds refers not to the solemnities of the contract, but to the procedure, and consequently that an action will not lie in this country on an agreement made in a foreign country, and valid there, which, if made here, would have been incapable of being sued on by reason of this section.(d)

§ 331. It is obvious that in many cases a defence to a *suit for specific performance may be grounded on this section. We shall [*156] proceed therefore to consider (1) how such defence may be taken advantage of, (2) what constitutes a sufficient agreement, or memorandum or note thereof, within the meaning of the statute, and (3) what takes an agreement out of the statute in the contemplation of a court of equity.

§ 332. The want of an agreement within the statute may, when clearly appearing on the bill, be taken advantage of by general demurrer,(e) or by a demurrer alleging the want of such an agreement,(f) because, though some states of facts might, as we shall hereafter see, take the case out of the statute, and so render the want of writing not fatal to the plaintiff, yet it lies on him to allege them, and not on the defendant to negative them. In this respect, there is a wide difference between the Statute of

(y) Attorney-General v. Corporation of Norwich, 16 Sim. 225; Simpson v. Denison, 10 H. & J. 51; and see on this point, Eastern Counties Railway Company v. Hawkes, 5 Ho. Lords, 331.

(z) Bright v. North, 2 Phil. 216.

(a) 29 Car. II. c. 3.

(b) 8 & 9 Vic. c. 16. See also, as to joint stock companies, 19 & 20 Vic. c. 67, s. 41.

(c) Leominster Canal Company v. Shrewsbury and Hereford Railway Company. 3 K. & J. 654.

(d) Leroux v. Brown, 12 C. B. 801.

(e) Field v. Hutchinson, 1 Beav. 599.

(f) Wood v. Midgley, 5 De G. M. & G. 41; S. C. 2 Sm. & Gif. 115; Barkworth v. Young, 4 Drew, 1. See also Howard v. Okeover, 3 Sw. 421, n.

Frauds and the Statute of Limitations, which it seems must in all cases be pleaded.(g)

§ 333. The benefit of the statute may also be had by plea. Where the bill alleges an agreement, and is silent as to part-performance, it seems to have been thought that a plea of the statute was not enough without an answer also denying an agreement, on the ground that the answer might confess the agreement, and that then it would be enforced.(h) But this does not now appear to be the law of the court, for as we shall see, an answer confessing an agreement, and claiming the benefit of the statute, is a bar: and a plea without an answer must, it seems, be at least equivalent to such an answer, for taken most strongly against the defendant, it must amount to a confession of the agreement and a claim of the benefit of the statute.

*§ 334. To a bill alleging a parol agreement and part performance, [*_157] a plea averring that there was no agreement in writing, and an answer insisting that the alleged acts did not amount to part-performance, was allowed by Lord Thurlow, after great consideration and much argument.(i) For the statute and the doctrine of equity taken together amount to this, that there must be either a writing signed, or a parol agreement and part-performance: the one alternative was met by the plea, the other by the answer; together therefore they met the whole bill.

§ 335. Such a bill cannot, it seems, be met by a plea alone, for a plea in bar to such a bill would contain two distinct points,—namely, the denial of the written agreement and of the acts of part-performance, and would therefore be multifarious and bad.(k)

§ 336. An answer denying the agreement is of course a good answer to a bill: and where the answer denies, or does not admit the agreement, the defendant need not plead the statute in order to avail himself of it as a defence, for then the burthen of proof is wholly on the plaintiff, who must prove a valid agreement capable of being enforced.(l)

§ 337. But where the answer admits an agreement, though but a parol one, the defendant must plead the statute in order to avail himself of it; for otherwise he is taken to have admitted an agreement, which either is good under the statute, or on some other ground is binding upon him.(m)

*§ 338. For some time the court was disposed to allow the plaintiff the benefit of the admission, notwithstanding the defendant's insisting on the statute: but in later times the court has inclined against it,(n) and it is now well established that the defendant,

(g) Per Lord Cranworth in *Ridgway v. Wharton*, 3 De G. M. & G. 691.

(h) *Child v. Godolphin*, 1 Dick. 39, before Lord Macclesfield.

(i) *Whitchurch v. Bevis*, 2 Bro. C. C. 559; S. C. 2 Dick. 664. See also *Hosier v. Read*, 9 Mod. 86; *Moore v. Edwards*, 4 Ves. 23; *Bowers v. Cator*, 4 Ves. 91; *Evans v. Harris*, 2 V. & B. 361.

(k) *Whitbread v. Brockhurst*, 1 Bro. C. C. 404; and see *Belt's n. and Redes. Plead.* 268. See also, as to this plea, *Child v. Comber*, 3 Sw. 423, n.; for a plea to a parol agreement varying a written, *Jordan v. Sawkins*, 3 Bro. C. C. 388; and for a plea alleging revocation of agency, *Mason v. Armitage*, 13 Ves. 25.

(l) *Ridgway v. Wharton*, 3 De G. M. & G. 677; S. C. in D. P. 6 Ho. Lords, 238.

(m) *S. C. Croyston v. Banes*, Prec. Ch. 208; *Symondson v. Tweed*, id. 374.

(n) Per Lord Eldon in *Ex parte Whitbread*, 19 Ves. 212.

notwithstanding his admission, is entitled to the full benefit of the statute.(o)

§ 339. But if the defendant wishes to avail himself of the statute, he must do so at the same time that he admits the agreement: so that where the answer to the original bill admitted the agreement, and submitted to perform it, and the answer to the amended bill relied on the statute as a defence, that was overruled:(p) and so, too, where the answer does not claim the benefit of the statute, it cannot be had by claim at the hearing.(q)

§ 340. The answer must distinctly claim it: so that where the answer alleged that no formal note of the agreement was made, and denied that any binding agreement ever existed, but did not expressly claim the benefit of the statute, the defendant was held to be disentitled to it.(r) It is not necessary that the defendant should "claim the benefit in the very words of the statute, but he must claim it in words equivalent, so as to call the attention of the plaintiff to the circumstance that the benefit of the statute is claimed."(s)

§ 341. The object of the Statute of Frauds being to prevent the mischief arising from the resort to parol evidence to prove the existence and the terms of the alleged *agreement in the cases specified in it, [*159] it is obvious that the mischief is avoided wherever there exists, under the hand of the party sought to be charged, a written statement, containing, either expressly or by necessary inference, all the terms of the agreement,—that is to say, the names of the parties, the subject-matter of the contract, the consideration and the promise,(t) and leaving nothing open to future treaty.(u) This therefore is sufficient to satisfy the statute, and provided this be found, no formality is required, nor does it signify at all what is the nature or character of the document containing such written statement,—whether it be a letter written by the party to be charged to the person with whom he contracted, or to any other person, or a deed, or other legal instrument, or an answer to a bill, or an affidavit in chancery, in bankruptcy, or in lunacy.(v)

§ 342. But there is of course no binding agreement when the writing appears only to be terms agreed on as a basis for an agreement, and not the agreement itself;(w) or where it provides that any of the terms are afterwards to be settled,(x) or where the matter is unconcluded, and one party may still withdraw his consent;(y) or where there appears any

(o) *Cooth v. Jackson*, 6 Ves. 12; *Moore v. Edwards*, 4 Ves. 23; per Lord Eldon, in *Rowe v. Teed*, 15 Ves. 375; *Blagden v. Bradbear*, 12 Ves. 466. See contra, *Mussell v. Cooke*, Prec. Ch. 523.

(p) *Spurrier v. Fitzgerald*, 6 Ves. 548; *Beatson v. Nicholson*, 6 Jur. 621.

(q) *Baskett v. Cafe*, 4 De G. & Sm. 388.

(r) *Skinner v. McDouall*, 2 De G. & Sm. 265.

(s) Per *Wigram, V. C.*, in *Beatson v. Nicholson*, 6 Jur. 621.

(t) *Laytharp v. Bryant*, 2 Bing. N. C. 735.

(u) *Ogilvie v. Foljambe*, 3 Mer. 53. (v) *Barknorth v. Young*, 4 Drew, c. 13.

(w) *Frost v. Moulton*, 21 Beav. 596. See § 203 et seq.

(x) *Wood v. Midgley*, 5 De G. M. & G. 41.

(y) *Lord Glengal v. Barnard*, 1 Ke. 769, affirmed as *Lord Glengal v. Thynne*, Sug. Law of Prop. 56.

design of further negotiation.(z) Therefore where the purchaser's solicitor offered £25,000 for the purchase of an estate, which the defendant's agent accepted, "subject to the terms of a contract being arranged between his (the vendor's) solicitor and yourself," the court considered this as in the light of a contract to enter into a contract with respect to which some terms were already agreed on, and the rest were to be settled by future arrangements, and that if they could be agreed on, this was to [*160] *become a valid contract: but such an agreement never having been come to, the court dismissed the purchaser's bill asking for a specific performance.(a) It seems to be on this principle that the approval of a draft does not of itself constitute an agreement.(b)

§ 343. The court will refuse to act even where it only "rests reasonably doubtful whether what passed was only treaty, let the progress towards the confines of agreement be more or less."(c)

§ 344. But the mere fact, though appearing on the paper, that a more formal agreement is intended to be drawn up, will not prevent a paper duly signed and containing all the terms from being an agreement, any more than will be a reference to deeds thereafter to be executed.(d) Therefore where A. wrote to B., "I offer you £3000 for the estate," and B. replied, "I accept your offer, and if you approve of the enclosed, sign the same, and I will on receipt of the deposit sign you a copy" (the enclosure was not produced,) the court held that there was a binding contract, and treated the enclosure as a mere means of carrying that contract into effect :(e) and in another case,(f) a correspondence about the taking of a house was held to constitute a sufficient agreement, though the agent of the lessor accepted the offer thus, "These terms I have submitted to Mrs. S., and I am authorized to say they are accepted, and that her solicitor will draw up a proper agreement for signature, which I will forward to you."

§ 345. But wherever the formal agreement contemplated *is [*161] to be anything more than merely ancillary to the real agreement,—wherever any new term might be introduced into the formal agreement not contained in the earlier one, the first document will not be binding. And wherever the conclusive nature of the arrangement does not evidently appear on the writings, the fact that a subsequent and more formal agreement was intended to be entered into will be strong evidence that the previous negotiations were not intended to amount to an agreement.(g)

§ 346. The statute requiring that the agreement, or the memorandum, or note thereof, shall be signed by the party to be charged therewith, or

(z) Tawney v. Crowther, 3 Bro. C. C. 318; Stratford v. Bosworth, 2 V. & B. 341.

(a) Honeyman v. Marryat, 21 Beav. 4; S. C. 6 Ho. Lords, 112.

(b) Doe d. Lambourn v. Pedgrifph, 4 Car. and P. 312.

(c) Per Lord Eldon in Huddleston v. Briscoe, 11 Ves. 592.

(d) Fowle v. Freeman, 9 Ves. 351. See per Lord Cranworth in Ridgway v. Wharton, 6 Ho. Lords, 264; per Lord Langdale in Thomas v. Dering, 1 Ke. 741; Cowley v. Watts, 17 Jur. 172, (M. R.) See ante, § 175.

(e) Gibbins v. North-eastern Metropolitan District Asylum, 11 Beav. 1.

(f) Skinner v. McDouall, 2 De G. & Sm. 265.

(g) Ridgway v. Wharton, 6 Ho. Lords, 238, particularly 268, 305.

his agent, and not by both parties to the contract, it has been held both in the courts of equity(*h*) and law,(*i*) that a signature by the party against whom the contract is sought to be enforced is sufficient.

§ 347. All that is requisite to satisfy the statute as to the signature of the agreement is, that the name be inserted by the party in such a manner as to authenticate the instrument; accordingly, a letter beginning "Mr. Foljambe presents his compliments" was held duly signed.(*k*) The same was the case where A. wrote "A. has agreed," etc.;(*l*) and where B. wrote "A. agreed with B.," etc.(*m*) An affidavit made by a person has been also held sufficient.(*n*)

§ 348. It cannot be denied that there is some conflict of authority on the question how far the writing of his name by the party must be with the intent of signing. In some cases it has been held that such a writing with a different intent, amounts to a signature; as where a party *has written his name at the beginning, and left a place for his signature at the bottom, and thus shown "that the insertion of [*162] the name at the beginning was not intended to be a signature, and that the paper was meant to be incomplete until it was further signed;"(*o*) and where a person who is a party or principal, or person to be bound, signs as a witness, which he cannot be, he has been held to have signed as a principal.(*p*) In other cases the court has had regard to the intention of the signature; the Court of Queen's Bench, on this ground, held that a person capable of being a witness, and signing as such, will not be bound by the instrument as a party, or as agent of a party :(*q*) and where the names were written at the beginning of an agreement which concluded with the words "as witness our hands," and no signatures followed, it was considered by the common pleas not to satisfy the statute, because the concluding words evidently showed an intention that the agreement should be signed at the foot.(*r*)

§ 349. And it seems clear that where the name, though written by the party, has been introduced for some particular purpose in the middle of a writing, as in the memorandum for a lease in the words "the rent to be paid to A.," that does not amount to a signature by A.(*s*)

§ 350. The signature must be the actual writing of the name, or the doing of some act intended by the person to be equivalent to the actual

(*h*) See ante, § 295.

(*i*) Egerton v. Mathews, 6 East, 307; Allen v. Bennet, 3 Taunt. 169; Laythoarp v. Bryant, 2 Bing. N. C. 735. See the editor's n. to Sweet v. Lee, 3 Man. & Gr. 462.

(*k*) Ogilvie v. Foljambe, 3 Mer. 53.

(*l*) Propert v. Parker, 1 R. & My. 625. See also Western v. Russell, 3 V. & B. 187; Morison v. Turnour, 18 Ves. 175.

(*m*) Bleakley v. Smith, 11 Sim. 150. (*n*) Barkworth v. Young, 4 Drew, 1.

(*o*) Per Lord Eldon in Saunderson v. Jackson, 2 B. & P. 239; Knight v. Crockford, 1 Esp. 190.

(*p*) Welford v. Beazely, 3 Atk. 503; Coles v. Trecothick, 9 Ves. 234, 251.

(*q*) Gosbell v. Archer, 2 A. & E. 500, where the court doubted the doctrine of Lord Eldon in Coles v. Trecothick; but see the observations of Lord St. Leonards. Vend. 116.

(*r*) Hubert v. Treherne, 3 Man. & Gr. 743; S. C. s. n. Hubert v. Turner, 4 Scot. N. S. 486.

(*s*) Stokes v. Moore, 1 Cox, 219; Hawkins v. Holmes, 1 P. Wms. 770.

signature of the name, such as a mark by a marksman. Therefore a letter beginning "My dear Robert," and concluding with the words [*163] "Do me *the justice to believe me the most affectionate of mothers," was held not to be signed within the statute.(t)

§ 351. A signature in pencil is not necessarily deliberative, and may be equally binding within the statute as one in ink.(t) And even a printed name may avail; so that where a vendor inserted in a printed invoice with his name on it, the name of the purchaser, it was held that there was such a ratification and adoption of the printed name as made it a signature, and satisfied the statute.(v)

§ 352. It seems that the setting down of the initials may be a sufficient signature.(w)

§ 353. Where the agreement purports to be signed by an agent, it must be alleged and distinctly proved by the plaintiff that the party who signed as agent was authorized to act as agent, not merely for the purpose of negotiating, but of concluding a binding contract.(x) the court has, when needful, directed an issue to try the question of agency when in contest between the parties.(y) The authority may be inferred by the court from the relation and conduct of the parties:(z) or the alleged principal, though he may have given no authority to the alleged agent, may, by representing that he has done so to the other party to the contract, estop himself from afterwards denying it.(a)

§ 354. The statute is silent as to the means by which the agent is to be appointed: it does not therefore require *writing, but may, [*164] except in the case of corporations, be by parol ;(b) and accordingly the authority of an agent to let lands, or otherwise deal with real estate, may be inferred from acts and letters, or other circumstances.(c)

§ 355. To this agency, as to any other authority, the maxim applies, *omnis ratihabitio retrotrahitur et mandato aequiparatur*, and therefore the subsequent ratification of a contract entered into by a person then unauthorized as agent, takes it out of the statute.(d) This ratification need not be by any express act; it is enough if the party whose authority is required takes the benefit of the contract, or even if, with a full knowledge of it, he passively acquiesced in it for a length of time longer

(t) Selby v. Selby, 3 Mer. 2.

(u) Lucas v. James, 7 Hl. 410, 419.

(v) Schneider v. Norris, 2 M. & S. 286; per Lord Eldon in Saunderson v. Jackson, 2 B. & P. 239. See also 1 Mad. Ch. 376, and the illustration there given from the stamping of Letters Patent by King William III.

(w) Selby v. Selby, Sug. Vend. 116.

(x) Blore v. Sutton, 3 Mer. 237; Ridgway v. Wharton, 3 De G. M. & G. 677; S. C. 6 Ho. Lords, 238, where the evidence of agency was fully discussed; Firth v. Greenwood, 1 Jur. N. S. 806, (Wood, V. C.)

(y) Howard v. Braithwaite, 1 V. & B. 202.

(z) Sharp v. Milligan, 22 Beav. 606.

(a) Ridgway v. Wharton, 6 Ho. Lords, 238, 297.

(b) Waller v. Hendon, 5 Vin. Abr. 524, pl. 45; Coles v. Trecotthick, 9 Ves. 234, 250; Clinan v. Cooke, 1 Sch. & Lef. 22. As the agent of joint stock companies, see 19 & 20 Vict. c. 47, s. 41.

(c) Dyas v. Cruise, 2 Jon. & Lat. 461.

(d) Maclean v. Dunn, 4 Bing. 722; Ridgway v. Wharton, 6 Ho. Lords, 238, 296.

than that reasonably to be allowed for the expression of dissent.(e) But it will not be implied from vague expressions to a third person.(f)

§ 356. The authority may be revoked at any time before execution, and such revocation may of course be proved by parol.(g)

§ 357. It is now clearly decided that at sales by auction, auctioneers are agents of the purchaser as well as of the vendor.(h) This conclusion seems arrived at from the necessity of the case, and the peculiar nature of the mode of sale;(i) and therefore when the necessity does not exist, as in a subsequent purchase in private from the auctioneer, no such agency arises.(k)

*§ 358. The clerks of agents are not generally agents for the [*165] principal; but evidence of assent on the part of the principal that they shall act as such will constitute them agents:(l) and on the principle of necessity or convenience, it has been held that the clerk of an auctioneer entering the names of the purchasers at the sale in a book, was an agent for the purchasers.(m)

§ 359. A solicitor employed in a marriage treaty, who drew up a minute of the arrangement came to at an interview, was held not to be an agent lawfully authorized to bind the parties, so as to make the insertion of their names in the minute a signature with the statute.(n)

§ 360. It is very frequently the case that letters between the parties are relied on, to prove a written contract. Sometimes (1) there is an unsigned writing containing all the terms of the contract, and the letters are adduced as incorporating that writing, and furnishing the signature of one or both of the parties; (2) sometimes they are adduced where the written contract is incomplete in one or more of its terms, and the letters are referred to, to supplement the defect; and (3) sometimes they are adduced as themselves constituting the contract.(o)

§ 361. (1) In order to make a contract binding under the Statute of Frauds, it is not necessary that it should be all contained in one paper, signed by the party; but the terms of the contract may be contained in one paper, and the signature may be found in some other paper, provided that such second paper refer to the paper which does contain the terms.(p)

(e) *Bigg v. Strong*, Week. Rep. 1857-1858, 173, (*Stuart, V. C.*)

(f) *Ridgway v. Wharton*, 6 Ho. Lords, 238.

(g) *Manser v. Back*, 6 Ha. 443.

(h) *Emmerson v. Heelis*, 2 Taunt. 38; *White v. Proctor*, 4 Taunt. 209; *Kemeyes v. Proctor*, 3 V. & B. 57; S. C. 1 J. & W. 350; *Buckmaster v. Harrop*, 7 Ves. 341; S. C. 13 Ves. 456; *Kenworthy v. Schofield*, 2 B. & C. 945; cf. *Bartlett v. Purnell*, 4 A. & E. 792.

(i) *Gosbell v. Archer*, 2 A. & E. 500; per Lord Langdale in *Lord Glengal v. Barnard*, 1 Keen, 788, affirmed in D. P. as *Lord Glengal v. Thynne*, Sudg. Law of Prop. 56.

(k) *Mews v. Carr*, 26 L. J. Ex. 39. (l) *Coles v. Trecothick*, 9 Ves. 234.

(m) *Bird v. Boulter*, 4 B. & Ad. 443.

(n) *Lord Glengal v. Barnard*, 1 Keen, 769, affirmed in D. P. See also *De Biel v. Thomson*, 3 Beav. 469.

(o) See *infra*, § 374.

(p) *Allen v. Bennet*, 3 Taun. 169; *Ridgway v. Wharton*, 3 De G. M. & G. 677; S. C. 6 Ho. Lords, 238. See also per Lord Eldon in *Coles v. Trecothick*, 9 Ves.

[*166] It seems to be necessary that there should be *a reference on the face of the paper containing the signature to the paper containing the terms; but as to the ascertainment and identification of the actual paper thus referred to, parol evidence is admissible;(*q*) for it is a thing collateral to the contract, and which cannot be contained in the contract itself: just as in the case of a bequest in a will, the thing given and the person to whom it is given must be mentioned in the instrument, but the actual identification of the thing and the person must, from the nature of the case, be dehors the instrument, and therefore a matter of parol evidence.(*r*)

§ 362. We have seen that there must be a reference: therefore, where the agreement made no reference to an advertisement respecting the property which was sought to be introduced to supply a term, it was held that this could not be done:(*s*) and so also, the mere admission in writing of an agreement, without ascertaining its terms, is inoperative.(*t*)

§ 363. Again, the reference must be to terms in writing: therefore where a writing duly signed referred not to a writing but to terms arranged by parol, there was no valid contract.(*u*)

§ 364. In *Tawney v. Crowther*,(*v*) the agreement was reduced into writing, and was in possession of the defendant, who, in answer to a letter from the plaintiff's solicitor, asking him to meet him and sign the agreement, wrote a letter, in which he mentioned his having been from home, acknowledged having said his word should be as good as his bond, and that there was time enough before Michaelmas to settle everything; and again said "that his word *should always be as good as any security he could give:" Lord Thurlow, first on plea of the statute, and subsequently on the answer which insisted on the statute, held that the letters and the paper together constituted a valid agreement. "If a letter cannot be referred to the agreement," said his lordship,(*w*) "or does not contain proper terms, I cannot treat it as out of the statute; but I confess, on what appears here, the papers do refer to that agreement, and contain a promise to perform it; the defendant did intend by the letter to raise a confidence that the agreement should be performed." Lord Redesdale has expressed his disapprobation of this case, considering that the promise was intended to be of an honorary and not of a legal and binding nature (*x*) and the correctness of the decision has been questioned by Lords Cranworth and Brougham in the recent case of *Ridgway v. Wharton*.(*y*)

§ 365. In another case,(*z*) the defendants' letters referred distinctly to the conditions of sale which were in their hands, signed by the plain-

250; *Gaston v. Frankum*, 2 De G. & Sm. 561; *Powell v. Dillon*, 2 B. & Beatty, 416.

(*q*) Per Lord Redesdale in *Clinan v. Cooke*, 1 Sch. & Lef. 33.

(*r*) See ante, § 209. (*s*) *Clinan v. Cooke*, 1 Sch. & Lef. 22.

(*t*) *Rose v. Cunynghame*, 11 Ves. 550; *Clerk v. Wright*, 1 Atky. 12.

(*u*) *Ridgway v. Wharton*, 3 De G. M. & G. 677; S. C. 6 Ho. Lords, 238.

(*v*) 3 Bro. C. C. 161, 318. (*w*) p. 320.

(*x*) See Belt's n. 3 Bro. C. C. 153.

(*y*) 6 Ho. Lords, 265, 271. See per Lord St. Leonards, S. C. 293.

(*z*) *Dobell v. Hutchinson*, 3 A. & E. 355. See also *Saunderson v. Jackson*, 2 B. & P. 238, and *Jackson v. Lowe*, 1 Bing. 9.

tiff, and the Court of Queen's Bench held that no parol evidence was necessary to connect the two, and consequently that there was a binding contract. And in a recent case,(a) where A. wrote to B., proposing to let a public-house on certain terms, and B.'s clerk met A. and discussed the terms of the lease, and afterwards B. replied that he was willing to take the premises of A., this was held to refer to the terms contained in A.'s letter, and to constitute a contract.

§ 366. (2) Again, letters may be used to supply a term wanting in an agreement: thus, where, in an agreement, the lessor's name was not mentioned, and subsequently a letter from the lessee, referring to this agreement, mentioned his name in a manner from which the court could *imply that he was lessor, it was held a sufficient agreement.(b)

§ 367. (3) Letters may of course themselves constitute the [*_168] agreement; and the cases in which a contract is thus constituted by correspondence between the parties are very numerous; many of them have been already discussed.(c)

§ 368. The contract may even be sufficiently evidenced by a letter addressed to a third person, provided it ascertain the term of the agreement.(d)

§ 369. It is desirable to consider the effect of letters which repudiate or disown a contract referred to in them. The subject was discussed in the recent case of *Warner v. Willington*,(e) before Vice-Chancellor Kindersley: in that case there was a memorandum for a lease, signed by the defendant, the proposed lessee, but deficient in the lessor's name, and then a letter by the defendant, withdrawing the memorandum, but referring to the lessor's name: and the vice-chancellor held that the letter supplied the original defect in the agreement, and converted it into one binding under the statute. It may be submitted that this decision is not without difficulties on principle; for it would seem that the whole letter must be looked at, and then that affirms the memorandum to be, what in fact without the letter it was, namely, a mere offer; and, further, the case appears difficult to reconcile with other decisions. Thus, where buyers have written letters distinctly referring to invoices of the goods, but insisting that they were not bound to accept the goods, and thus repudiating the contract, the courts have held that there is no sufficient writing within the 17th section of the Statute of Frauds:(f) and in a recent case(g) in the exchequer, in which *Warner v. Willington* was cited, the court considered that it would be treating the Statute of Frauds as nothing, if a letter, merely declining to accept goods under a parol agreement or an insufficient written agreement, were held to take the case out of the statute. And again, in a

(a) *Wood v. Scarth*, 2 K. & J. 33.

(b) *Warner v. Willington*, 3 Drew, 523. See this case infra, § 369.

(c) See ante, § 169 et seq. See also *Western v. Russell*, 3 V. & B. 187.

(d) Per Lord Hardwicke in *Welford v. Beazely*, 3 Atk. 503; *Child v. Comber*, 3 Sw. 423, n.; *Seagood v. Meale*, Prec. Ch. 560. See also *Barkworth v. Young*, 4 Drew, 1, particularly 13.

(e) 3 Drew, 523.

(f) *Cooper v. Smith*, 15 East, 103; *Richards v. Porter*, 6 B. & C. 437; per Lord Denman in *Dobell v. Hutchinson*, 3 A. & E. 371; *Gosbell v. Archer*, 2 A. & E. 500.

(g) *Goodman v. Griffiths*, 26 L. J. Ex. 145.

recent case in chancery,(h) Lord Justice Turner treated the argument, that a letter declining to enter into an agreement could constitute one, as too strained to require any observation.

§ 370. It is now distinctly settled, after some difference of opinion, that a written agreement after marriage, in pursuance of a parol one before, takes the case out of the statute.(i)

§ 371. With regard to the mode in which an agreement within the statute should be pleaded, it is sufficient to allege that the agreement was in writing, without alleging that it was signed; for, if it was not signed, there was no agreement.(k) And where the plaintiff relied on an affidavit alleged to have been filed by the defendant, containing the terms of the agreement, his signature to the affidavit, though not alleged was presumed by the court, as an affidavit must be signed as well as sworn.(l)

§ 372. But it is not enough to allege an agreement without stating that it was in writing; for a parol agreement is still an agreement, and a bill merely alleging an agreement is therefore open to demurrer.(m)

[*§ 373. But the allegation that the agreement was in writing] is not of such materiality that it must be proved; so that an agreement so alleged will be sufficiently established by an admission in the answer of a parol agreement.(n)

§ 374. There is a distinction between pleading letters, as constituting the agreement, and as evidence only of the agreement: in the former case, no other evidence than the letters themselves can be admitted—so that, if they do not contain all the terms of the agreement, the bill will be dismissed; whereas in the latter case, other evidence may be admitted.(o)

§ 375. Courts of equity, hold that, notwithstanding the express language of the statute, a case may be taken out of its operation by any one of the following circumstances:—(1) by the sale being by the court, (2) by an admission in the answer of a parol agreement where the answer does not insist on the statute, (3) by fraud, and (4) by a parol agreement and part performance, which is, as we shall see, but a particular case of fraud.

§ 376. (1) It has been held that a sale before a master confirmed by the court, was, from the judicial character of the proceedings, exempted

(h) *Wood v. Midgley*, 5 De G. M. & G. 41, 46.

(i) *Taylor v. Beech*, 1 Ves. Sen. 297; per Lord Cottenham in *Hammersley v. De Biel*, 12 Cl. & Fin. 64, n.; per Turner, L. J., in *Surecome v. Pinniger*, 2 De G. M. & G. 575; *Barkworth v. Young*, 4 Drew, 1. See also *Hodgson v. Hutchenson*, 5 Vin. Abr. 522, pl. 34. In *Randall v. Morgan*, 12 Ves. 67, Sir Wm. Grant expressed doubts on this point.

(k) *Rist v. Hobson*, 1 S. & S. 543.

(l) *Barkworth v. Young*, 4 Drew, 1.

(m) S. C., and see per Lord Thurlow in *Whitchurch v. Bevis*, 2 Bro. C. C. 559; per Sir W. Grant in *Spurrier v. Fitzgerald*, 6 Ves. 555.

(n) *Spurrier v. Fitzgerald*, 6 Ves. 548.

(o) *Birce v. Bletchley*, 6 Mad. 17; ante, § 360.

from the Statute of Frauds :*(p)* and consequently might be enforced against the representative of a purchaser who had not subscribed.*(q)* The same rule will no doubt be applied to sales under the present practice.*(r)*

§ 377. (2) An admission of a parol agreement in the defendant's answer has long been held to take the case out of the statute, where the answer does not insist on the *statute, because it takes it out of [*171] the mischief which the statute was designed to remedy.*(s)* An other reason has been suggested, namely, that the contract, though originally in parol, is after admission evidenced by writing under the signature of the party, which is a complete compliance with the terms of the statute.*(t)*

The effect of such an admission, against the person making it, is clear : and it seems that it would bind the heir of such person, in case of his death, and a bill of revivor being filed against the heir.*(u)* It was formerly held that where a vendor dies, and a bill is brought by his personal representative against the purchaser and the heir of the vendor, the admission by the purchaser would take the agreement out of the statute, not only against the purchaser but the vendor's heir.*(v)* But that is not now the law: to entitle the real or personal representative to enforce the execution of a contract to the prejudice of the other, there must have been at the death of the contractor a contract by which he was legally bound, and which the court would have compelled him specifically to execute:*(w)* and so, notwithstanding that a personal representative may submit to carry out the contract, it is open to the parties interested to take every objection which the deceased might himself have taken, if living.*(x)*

§ 378. (3) The principle upon which the court considers fraud as forming an exception to the statute, has been stated by Lord Eldon. "Upon the Statute of Frauds," said his lordship,*"(y)* "though declaring that interests shall not be bound except by writing, cases in this court are *perfectly familiar deciding that a fraudulent use shall not be made of that statute ; where this court has interfered against a [*172] party meaning to make it an instrument of fraud, and said he should not take advantage of his own fraud, even though the statute has declared that in case those circumstances do not exist, the instrument shall be absolutely void. One instance is the case of instructions upon a treaty of marriage : the conveyance being absolute, but subject to an agreement for a defeasance, which, though not appearing by the contents of the conveyance, can be proved *aliunde*; and there are many other instances."

§ 379. Thus, in one case,*(z)* Lord Thurlow allowed a plaintiff to give parol evidence that, at the time the agreement was entered into, an un-

(p) Attorney-General v. Day, 1 Ves. Sen. 218; per Sir W. Grant in Blagden v. Bradbear, 12 Ves. 472; per Lord Cottenham in Ex parte Cutts, 3 Deac. 267.

(q) Lord v. Lord, 8 Sim. 503.

(r) St. Leonards, Vend. & Pur. 86.

(s) Gunter v. Halsey, Ambl. 586; Limondson v. Sweed, Gilb. 35. See the remarks on this doctrine of Lord Rosslyn in Rondeau v. Wyatt, 2 H. Bl. 68.

(t) Story, Eq. Jur. s. 755. *(u)* Attorney-General v. Day, 1 Ves. Sen. 218, 221.

(v) Lacon v. Mertins, 3 Atky. 1. See also Potter v. Potter, 1 Ves. Sen. 437.

(w) Buckmaster v. Harrop, 7 Ves. 341; S. C. 13 Ves. 456.

(x) S. C.

(y) In Mestaer v. Gillespie, 11 Ves. 627, 628.

(z) Pember v. Mathers, 1 Bro. C. C. 52.

dertaking had been given by the assignee of the lease to the assignor for indemnity against the rents and covenants, his lordship laying it down "that where the objection is taken before the party execute the agreement and the other side promise to rectify it, it is to be considered a fraud on the party if such promise is not kept."(a) And in a case(b) which occurred before Lord Nottingham soon after the making of the statute, there was a parol agreement for the loan of money on a mortgage by an absolute conveyance from the mortgagor, and a defeasance from the mortgagee: after the mortgagee had got the conveyance, he refused to execute the defeasance, but was decreed to do so on the ground of fraud.

§ 380. The same principle has been considered to apply to marriage contracts. In *Dundass v. Dutens*,(c) Lord Thurlow intimated an opinion that, where there was a parol agreement for a settlement, and then, in [*173] fraud of that *agreement, the husband gets married, he will be bound by the agreement. But as it is clear that marriage by itself is no part performance,(d) and as the doctrine of part performance is only part of the principles of the court as to fraud generally, the case seems difficult to support.(e)

§ 381. And in cases of wills obtained by a promise to dispose of the property in a particular way, the court will, notwithstanding the language of the Statute of Frauds that every will must be in writing, give effect to the verbal arrangement by raising a trust on the property devised or bequeathed by the will.(f)

§ 382. It was formerly thought, that alleging it to have been part of the parol agreement between the contracting parties that the agreement should be reduced into writing, would take the case out of the statute, on the ground of fraud: accordingly, where a bill containing such an allegation was met by a plea of the statute, Lord North, after argument, ordered the defendant to answer so much of the bill only as charged that the said agreement was to be put into writing.(g) It seems obvious, however, that such a procedure affords a most easy means of evading the intention of the statute, and introducing the mischief it was designed to remedy: and accordingly, the law is now clearly established, that such an allegation is no saving to a plea of the statute,(h) and that after a parol agreement, a refusal to sign a written one is no fraud of which the court can take cognizance.(i)

(a) Per Sir W. Grant in *Clarke v. Grant*, 14 Ves. 525; see *Colyer v. Clay*, 7 Beav. 188.

(b) 1 Eq. Cas. Abr. 20, pl. 5; *Walker v. Walker*, 2 Atk. 98.

(c) 1 Ves. jun. 196. See also *Viscountess Montacute v. Maxwell*, 1 P. Wms. 618.

(d) See *infra*, § 408.

(e) *Warden v. Jones*, 23 Beav. 487, where Sir John Romilly considered these cases.

(f) *Podmore v. Gunning*, 7 Sim. 644, where the previous cases are cited and considered; *Chester v. Urwick*, 23 Beav. 407.

(g) *Leake v. Morris*, 1 Dick. 14; S. C. s. n. *Leake v. Morrice*, 2 Cas. in Ch. 135; *Hollis v. Whiteing*, 1 Vern. 151; *Deane v. Izard*, 1 Vern. 159.

(h) *Witchurch v. Bevis*, 2 Bro. C. C. 565; *Wood v. Midgley*, 5 De G. M. & G. 41; S. C. 2 Sm. & Gif. 115.

(i) S. C.

§ 383. (4) The part performance of a contract by one of *the parties to it may, as has already been stated, take the contract [*174] in a court of equity out of the operation of the Statute of Frauds, and render it, although merely resting in parol, capable of being enforced by way of specific performance.

§ 384. In order thus to withdraw a contract from the operation of the statute, several circumstances must concur : 1st, the acts of part performance must be such as are not only referable to an agreement such as that alleged, but such as are referable to no other title ; 2ndly, they must be such as render it a fraud in the defendant to take advantage of the contract not being in writing ; 3rdly, the agreement to which they refer must be such as in its own nature is enforceable by the court ; and 4thly, there must be proper evidence of the parol agreement, which is let in by the acts of part performance.

§ 385. (1) It seems evident that all that can be gathered from acts of part performance, is the existence of some agreement in pursuance of which they are done : they cannot, unless possibly in some very singular case, be themselves sufficient evidence of the particular agreement alleged, because they cannot in themselves show all the terms of the contract from which they flow. They may be evidence of an unknown agreement, but the making known what that agreement is must be the result of the evidence which the acts in question are allowed to introduce.(k) It cannot be denied that there is some want of exact accuracy in this respect in the statements sometimes made, as for instance, where it is said that the acts must be referable to the alleged agreement : and Lord Redesdale seems to have held that to admit parol evidence, the part performance must be such as to show the very same agreement as the plaintiff alleged. So that in a case where the *plaintiff stated a parol [*175] agreement for a lease for three lives, and payment of rent in part performance, the defendant admitted an agreement but for one life, and not for three : his lordship said that the Statute of Frauds put it out of the power of the court to execute the agreement for the lease for three lives, the part performance being perfectly consistent with the agreement alleged by the defendant, and that therefore there was no case to admit proof of a further agreement.(l)

§ 386. The true principle, however, of the operation of acts of part performance seems only to require that the acts in question be such as must be referred to some agreement, and may be referred to the alleged one ; that they prove the existence of some agreement, and are consistent with the agreement alleged : and this is very well illustrated by a recent case(m) in the common pleas on the 17th section of the Statute of Frauds, by which acceptance is treated as such an act of part performance as dispenses with the necessity of writing. It was there held, that bare acceptance of the goods by the vendee is sufficient to satisfy the section of the statute, so that, although the vendee immedi-

(k) See per Lord Alvanley in *Foster v. Hall*, 3 Ves. 712; per Wigram, V. C., in *Dale v. Hamilton*, 5 Ha. 381.

(l) *Lindsay v. Lynch*, 2 Sch. & Lef. 1, particularly 8. See infra, § 423.

(m) *Tomkinson v. Staight*, 17 C. B. 697.

ately after accepting them stated that he did so on terms different from those on which the vendor delivered them, yet the acceptance having established the fact of a contract of sale, parol evidence of its terms was admissible. It was there strongly urged that the acceptance must be equivalent to a memorandum in writing, and must show all the terms of the contract; but the doctrine was denied by the learned judges, both during the argument and by their decision of the case. Williams, J., in the course of his judgment, said, (n) "The legislature has thought that where there is a fact so consistent with the existence of a contract of sale as the actual acceptance of part of the *goods sold, the necessity of a written evidence of the contract might safely be dispensed with. But it is clear that it was not meant to go to all the terms of the contract: and that acceptance is no evidence of the price, but only establishes the broad fact of the relation of vendor and vendee. So where there is proof of part performance, the jury must settle all the other facts that go to make up the contract."

§ 387. To make the acts of part performance effective to take the agreement out of the Statute of Frauds, they must be such as cannot be referred to any other title than such an agreement as that alleged, nor have been done with any other view or design than to perform such an agreement: (o) therefore, where a tenant in possession sued for the specific performance of an alleged agreement for a lease, and set up his possession as an act of part performance of the agreement, it was held not to be such, because it was referable to his character as tenant. (p) So again, where a tenant from year to year continues in possession, and lays out such moneys on the farm as are usual in the ordinary course of husbandry, this is no part performance of an agreement for a lease. (q) And again, where a tenant under a term alleged the rebuilding of a party-wall, which was in a ruinous state during his term, as part performance of an agreement by his landlord to grant a renewed term: it was held that the act was equivocal, as it might have been done by him in respect of his title under the old as well as under the alleged new term. (r)

§ 388. (2) The principle upon which courts of equity exercise their jurisdiction in decreeing specific performance of parol agreement, accompanied by part performance, is *the fraud and injustice which would result from allowing one party to refuse to perform his part, after performance by the other upon the faith of the contract: (s) and this principle extends not only to contracts, which but for such part performance would be void by reason of the Statute of Frauds, but to such as being entered into by corporations are invalid for want of their corporate seal. (t) Such being the principle on which the court acts, it follows that, where the acts of part performance by the one are not such as to

(n) p. 707.

(o) Gunter v. Halsey, Ambl. 586.

(p) Wills v. Stradling, 3 Ves. 378; per Lord Eldon in *Ex parte Hooper*, 19 Ves. 479; per Sir T. Plumer in *Morphett v. Jones*, 1 Sw. 181; 5 Vin. Abr. 323, pl. 41.

(q) *Brennan v. Bolton*, 2 Dr. & W. 349.

(r) *Frame v. Dawson*, 14 Ves. 386.

(s) Per Sir Wm. Grant in *Buckmaster v. Harrop*, 7 Ves. 346; per Lord Cottenham in *Mundy v. Jolliffe*, 5 My. & Cr. 177.

(t) *London and Birmingham Railway Company v. Winter*, Cr. & Ph. 57; Earl of Lindsey v. Great Northern Railway Company, 10 Ha. 664, 700.

render refusal to perform by the other party a fraud in him, however clearly they may evidence the existence of an agreement, the jurisdiction in question can have no application ; and this may be the case either (1) from the nature of the acts themselves, which we shall afterwards consider, or (2) from the character of the person permitting them.

§ 389. On this latter ground, it has been decided that where a plaintiff seeks to enforce against a remainderman a parol agreement entered into between the plaintiff and the tenant for life, acts of part performance which would have bound the tenant for life will not bind the remainderman, unless it can be shown that he permitted the acts of the plaintiff with a knowledge of the agreement entered into by the tenant for life.(u) For to constitute fraud, there must coincide in one and the same person knowledge of some fact and conduct inequitable having regard to such knowledge. And again, on the same principle, where the acts are those of persons not parties to the contract, they will not be binding, so that for instance, acts done by arbitrators *towards the performance [*178] of their duty, are not part performance of a parol agreement for a compromise and division of estates by arbitrators.(v)

§ 390. From the nature of the act, it follows, that though, as we shall hereafter see, it has been a question how far the acceptance of part of the purchase-money binds the vendor, the payment of this on the part of the purchaser can in no wise bind him, because to refuse to complete the contract after paying "part of his purchase-money, would be no fraud upon the seller, but his own loss." The question was raised in a case(w) where the heir-at-law of a purchaser sought the enforcement of the contract against the personal representative of his ancestor, and set up his part payment as a part performance making it a binding contract : but on the ground above stated, Sir William Grant decreed against the claim of the heir.

§ 391. From the same principle too it seems doubtful whether any acts which admit of alternative remedies, one by the execution of the agreement and one by some other means, as under the Land Clauses Consolidation Act, can be taken as part performance, because there is no fraud on the other party if the remedy other than that by execution of the contract be pursued.(x)

§ 392. (3) The agreement which the acts of part performance allow to be set up by parol evidence, must be of such a nature that the court would have had jurisdiction in respect of it in case it had been in writing. Where the court has jurisdiction in the original subject-matter, viz. the contract, the want of writing will not deprive the court of it where there is part performance. But the want of writing cannot itself be made the ground of jurisdiction ; for then all parol contracts which the Statute of Frauds *requires to be in writing might be enforced in equity when [*179] there was part performance, which is not the case. Accordingly,

(u) *Blore v. Sutton*, 3 Mer. 237 ; *Whitbread v. Brockhurst*, 1 Bro. C. C. 404 ; per Lord Redesdale in *Shannon v. Bradstreet*, 1 Sch. & Lef. 72 ; per Lord Cranworth in *Morgan v. Milman*, 3 De G. M. & G. 33.

(v) *Cooth v. Jackson*, 6 Ves. 12.

(w) *Buckmaster v. Harrop*, 7 Ves. 341 ; S. C. 13 Ves. 456.

(x) See per Lord Cranworth in *Morgan v. Milman*, 3 De G. M. & G. 35.

a demurrer to a bill for work and labour done, alleging fraud and part performance, was allowed by Lord Cottenham, reversing a decision of the vice-chancellor of England.(y) And where the possession taken is not under a contract but adverse, the circumstance that there is no legal remedy does not suffice to give the court jurisdiction.(z)

§ 393. So, where the engagement is of an honorary and not of a legal character, part performance gives the court no jurisdiction.(a) Thus in the case of *Lord Walpole v. Lord Orford*,(b) where two testators on the same day and in the presence of the same witnesses executed mutual wills; one of the testators having died,—it was argued that there was part performance under circumstances which could only be referred to an agreement between the testators to make such wills: but Lord Rosslyn, though inferring an agreement of some sort, held it to have been merely an honourable engagement, and one which the court therefore could not carry out.

§ 394. And on the same principle there can be no part performance of an incomplete agreement. For acts to amount to part performance, the agreement "must be obligatory, and what is done must be done under the terms of the agreement, and by force of the agreement."(c)

§ 395. Having thus stated the general character of the acts which is requisite to make them part performance for the purpose in question, I shall briefly state the result of these principles in respect of particular acts.

[*180] *§ 396. We have already seen that possession is in some cases equivocal in respect of the title to which it is to be referred: at other times it is not; therefore the possession of a tenant after the expiration of a lease, which was referable only to an agreement for a renewal, has been held part performance of such an agreement.(d)

§ 397. Still more clearly, "the acknowledged possession of a stranger in the land of another is not explicable except on the supposition of an agreement, and has therefore constantly been received as evidence of an antecedent contract."(e) Even where the possession has been taken without consent, yet if the owner afterwards allows the stranger to remain in possession, this will, it seems, operate as an act of part performance.(f)

§ 398. And so in a recent case,(g) where there was a parol promise before marriage to give certain property to the married pair by the father

(y) *Kirk v. Bromley Union*, 2 Phil. 640. The case of *Pembroke v. Thorpe*, 3 Sw. 437, n., may appear at variance with this view, but will be reconciled by considering that Lord Hardwicke held the court to have an original jurisdiction in respect of building contracts. See ante, § 48.

(z) *East India Company v. Nuthumbadoo Veerasawmy Moodelly*, 7 Moo. P. C. C. 482.

(a) Cf. ante, § 191.

(b) 3 Ves. 402.

(c) Per Lord Brougham in *Thynne v. Lord Glengall*, 2 Ho. Lords, 158.

(d) *Dowell v. Dew*, 1 Y. & C. C. C. 345.

(e) Per Sir T. Plumer in *Morphett v. Jones*, 1 Sw. 181, and see accordingly *Butcher v. Stapely*, 1 Vern. 363; *Pyke v. Williams*, 2 Vern. 455; *Earl of Aylesford's case*, 2 Str. 783; *Stewart v. Denton*, 1 Fonbl. Eq. 187; *Savage v. Carroll*, 1 Ball & B. 265; *Kine v. Balfte*, 2 Ball & B. 343.

(f) *Gregory v. Mighell*, 18 Ves. 328; *Pain v. Coombs*, 1 De G. & J. 34, 46.

(g) *Surcome v. Pinniger*, 3 De G. M. & G. 571. See also *Floyd v. Buckland*, 1 Freem. 268.

of the lady: the marriage took place, and was followed by the delivery up of possession to the son-in-law, expenditure of money by him, and the absence of all disturbance on the part of the father-in-law: these acts were held to be in part performance of the alleged antenuptial agreement. And in another recent case,(h) where a parol agreement was come to for a lease, and the terms of it were agreed on between the proposed lessor and lessee, and by the direction of the lessor, the lessee instructed a solicitor who acted for both parties to reduce the terms to writing; and the solicitor took a note of the terms thus stated to him, and from it prepared a draft agreement embodying *these and other terms, which he submitted to the lessor, who afterwards, [*181] without objecting to it, let the lessee into possession, and directed the solicitor to prepare a lease in pursuance of the draft agreement. A draft lease was accordingly prepared, to which the lessor objected, and gave the tenant notice to quit. The court held that there was part performance of the agreement, and enforced the same accordingly.

§ 399. The same principle applies in cases of family arrangements involving the giving up, partition, or exchange of land; so that though such agreements may be by parol, yet if they be followed by uninterrupted exclusive enjoyment of the several lands in pursuance of the arrangement, the court will specifically enforce them.(i)

§ 400. In considering this effect of possession where the acquiescence has been of very long duration, the court will regard this lapse of time as a circumstance against allowing the statute to be set up.(k)

§ 401. The laying out of money, provided it be such as would only be likely to take place in pursuance of such a contract as that alleged, and it be with the privity of the other party, is an act of part performance.(l) Therefore where a proposed lessee entered and built, the acts were held to be such;(m) and again, the alteration of a garden fence and the plantation of a meadow with the privity of the other party, and partly at his expense, by a tenant in possession, were held acts of part performance, evidencing a contract to demise the meadow for a term.(n)

§ 402. The expenditure of money differs, it will be *observed, [*182] from possession, in two respects: the one, that whilst mere possession is referable to a tenancy at will, as well as to a larger estate, the laying out of any considerable sums of money is rationally to be referred only to some agreement to confer a substantial interest in the property: the other, that whilst possession cannot be supposed to be continued by a stranger without the knowledge of the owner, a person in possession may well lay out money without the owner's cognizance: and what is therefore necessarily presumed in the one case must be proved in the other.

§ 403. It seems now to be decided that the payment by the purchaser

(h) Pain v. Coombs, 1 De G. & J. 34.

(i) Stockley v. Stockley, 1 V. & B. 23; Neale v. Neale, 1 Ke. 672.

(k) Blachford v. Kirkpatrick, 6 Beav. 232. (l) Wills v. Stradling, 3 Ves. 378.

(m) Savage v. Foster, 5 Vin. Abr. 524, pl. 43.

(n) Sutherland v. Briggs, 1 Hla. 26. See also Stockley v. Stockley, 1 V. & B. 23; Toole v. Medicott, 1 Ball & B. 393; Mundy v. Jolliffe, 5 My. & Cr. 167; Surcome v. Pinniger, 3 De G. M. & G. 571.

to the vendor of the whole or a part, whether substantial or unsubstantial, of the purchase-money, is not an act of part performance which will take the parol contract out of the statute. The grounds of this decision seem to be, first, that the mention of part payment in the 13th section of the Statute of Frauds, and the silence in that respect of the 4th section, must be taken to show that the legislature did not intend that part payment should be binding in cases of the sale of lands :^(o) and secondly, that the money may be repaid, and that both parties will then be in the situation in which they were before the contract, without either party having gained any inequitable advantage over the other.^(p) This is a case where for the act done there are alternative remedies, one by the execution of the contract, and the other by repayment,—and the election to put the other party to the latter remedy is no fraud. It has been ingeniously said that this reasoning overlooks the possibility of an insolvency intervening and preventing the repayment of the purchase-money,^(q) but the courts have not allowed this objection to prevail.

[*183] § 404. The law upon this subject has been somewhat *vacillating. In a case^(r) before Lord Hardwicke, he held part payment to be part performance; but this as a general proposition was early overruled. The question then arose whether, although payment of a small instalment was inoperative, payment of the whole or of a substantial part of the price would not be an act of part performance; and Lord Rosslyn maintained the affirmative of this question :^(s) but Lord Redesdale denied any such distinction,^(t) and it seems now to be overruled, upon the ground that it is impossible satisfactorily to discriminate between substantial and unsubstantial part payments.^(u)

§ 405. In one case, Sir William Grant seems to have held that the fact that money spent in repairs easily admitted of compensation without execution of the agreement, was a reason for not considering it as part performance;^(v) and where the acts relied on are proper to be brought before a jury, and can be answered in damages, they will not be considered as part performance.^(w) But it seems clear that there are many acts which might admit of compensation, which yet amount to such part performance, as will enable the court to enforce the parol agreement.

§ 406. Payment of the auction duty has been held not to be part performance, it being by the revenue laws essential to the contract, and “that without which there would have been no contract cannot be said to be in part performance of the contract.”^(x)

[*184] *§ 407. Payment of additional rent is in itself equivocal. It has been said, that if shown or admitted to have been on the foot

(o) *Clinan v. Cooke*, 1 Sch. & L. 22: *Watt v. Evans*, 4 Y. & C. Ex. 579.

(p) *Clinan v. Cooke*, 1 Sch. & L. 22. (q) 13 Ves. 461, n. by the Reporter.

(r) *Lacon v. Mertins*, 3 Atky. 4. See also *Child v. Comber*, 3 Sw. 423, n.

(s) *Main v. Melbourn*, 4 Ves. 720. See the arguments in *Wills v. Stradling*, 3 Ves. 378, and *Simmons v. Cornelius*, 1 Rep. in Ch. 138, (a case before the statute.)

(t) In *Clinan v. Cooke*, 1 Sch. & Lef. 22.

(u) *Watt v. Evans*, 4 Y. & C. Ex. 579. See *Ex parte Hooper*, 19 Ves. 479.

(v) *Frame v. Dawson*, 14 Ves. 386. See also *O'Reilly v. Thompson*, 2 Cox, 271.

(w) *South Wales Railway Company v. Wythes*, 1 K. & J. 186.

(x) Per Sir W. Grant in *Buckmaster v. Harrop*, 7 Ves. 346; S. C. 13 Ves. 456.

of the agreement, it is a circumstance of part performance ;(y) but that would be to infer an agreement not from the acts, but from evidence with regard to the acts, which seems clearly inadmissible ; and it has accordingly been since held that such a payment is not part performance.(z)

§ 408. Marriage is not alone a part performance of an agreement in relation to it : for to hold this would be to overrule the Statute of Frauds, which enacts that every agreement in consideration of marriage to be binding must be in writing.(a) And accordingly, where there was before marriage an agreement by parol for the settlement of part of the wife's property, and that the husband should take the rest, which he did, but there was no settlement made, and the wife subsequently filed her bill, stating these facts, for the purpose of obtaining a declaration of her rights in certain property coming to her, and the husband by his answer admitted the statements in the bill, and a deed was then prepared purporting to be a settlement on the wife in pursuance of the agreement, and was signed but not acknowledged by the wife : in a suit by a plaintiff claiming under the settlement against the heir, it was held that there was no part performance by marriage, nor any other part performance of the parol agreement, and that it was void and all the subsequent proceedings ineffectual.(b)

§ 409. There may, of course, often be acts connected with the marriage which, as independently of it they would be acts of part performance, are not the less so as being done in connection with it, and therefore differ from cases *where the marriage is the sole act relied on. Thus, in a case(c) which was ultimately decided by the house of lords, it was held that the execution by the husband of a settlement in pursuance of a parol agreement entered into by him with the lady's father previously to the marriage being something over and above the marriage, was an act of part performance of the parol contract entered into previously to it. In a recent case(d) the master of the rolls has held that the execution of a settlement is no act of part performance, where the previous parol agreement is between the intended husband and wife only, and not between the husband and some third person.

§ 410. The cases in which the court relieves on the ground of marriage in fraud of a parol agreement entered into previously must, of course, be distinguished from cases in which the marriage itself is set up as part performance of the agreement.(e)

§ 411. But though marriage be not, cohabitation may be a sufficient act of part performance. In a separation deed, the husband covenanted with a trustee for the payment of an annuity to his wife: shortly before the death of the husband, his wife returned to him upon the faith of a

(y) *Wills v. Stradling*, 3 Ves. 378. (z) *O'Herlihy v. Hedges*, 1 Sch. & L. 123.

(a) Per Lord Hardwicke in *Taylor v. Beech*, 1 Ves. Sen. 297; per Lord Thurlow, in *Dundass v. Dutens*, 1 Ves. jun. 199. As to this case, see the observations of Sir J. Romilly in *Warden v. Jones*, 23 Beav. 487.

(b) *Lassence v. Tierney*, 1 M^oN. & G. 551.

(c) *Hammersley v. De Biel*, 12 Cl. & Fin. 45, 64, n.; *Surcome v. Pinniger*, 3 De G. M. & G. 571.

(d) *Warden v. Jones*, 23 Beav. 487.

(e) See ante, § 380.

promise made by the husband to the wife and her trustee, that if she would do so he would continue to pay the annuity and would charge it upon his real estate. He died without having done so, and it was held that the agreement could be enforced against the devisees of the husband, on the ground of part performance.(f)

§ 412. As acts done prior to a contract cannot be referred to it as done in pursuance of it, they never can, it seems, be treated as acts of part performance.(g)

[*186] *§ 413. And so also, acts subsequent to the agreement, and even in pursuance of it, if not strictly in performance of the agreement as between the parties to it, but preparatory to such performance, cannot be taken as part performance. It is evident that acts of this sort may be, and for the most part are, the mere acts of the party doing them: the other party is not necessarily cognizant of them, and consequently he is not so bound by them as to render it fraudulent in him, subsequently to refuse to carry out the contract.

§ 414. Therefore giving instructions for a lease,(h) putting a deed into a solicitor's hands to prepare a conveyance,(i) giving orders for a conveyance to be drawn and going several times to view the estate,(k) the execution and registration of the deeds by the vendor,(l) and the admeasurement of the estate,(m) have all been decided not to be acts of part performance binding on the other party to the contract. So again, where it was a condition of the agreement that the plaintiff should obtain a release of a right from a third party, which the plaintiff did obtain by payment of a valuable consideration: it was held to be merely a preparatory act on the part of the plaintiff, and not a part performance of the contract.(n) And the appropriation of money by a party, though it may be with a view to an intended purchase, is not of itself any part performance or evidence of any contract.(o)

§ 415. To the same principle we may probably refer the case of Whaley v. Bagnal,(p) in the house of lords: A. agreed by parol with B. for the purchase of lands; B. *delivered a rent-roll to A., which [*187] showed by its heading that an agreement had been entered into between them for the sale of the lands comprised in it at twenty-one years' purchase, and an abstract of the title and deeds were also delivered to A. for the purpose of carrying out the sale: B. informed his creditors by letter that he had agreed to sell the land to A.: he took A. over the estate, introduced him as landlord to the tenants, and refused to renew leases and do other acts of management as owner, in these cases referring the tenants to A. B. also set up the contract against an elegit, and on

(f) Webster v. Webster, 27 L. J. Ch. 115, and S. C. before the L. J. J., 4 De G. M. & G. 437.

(g) Parker v. Smith, 1 Coll. C. C. 608, 623.

(h) Cole v. White, cited 1 Bro. C. C. 409.

(i) Redding v. Wilkes, 3 Bro. C. C. 400.

(k) Clerk v. Wright, 1 Atky. 12; Cooke v. Tombs, 2 Anstr. 420.

(l) Hawkins v. Holmes, 1 P. Wms. 770.

(m) Pembroke v. Thorpe, 3 Sw. 437, n. (n) O'Reilly v. Thompson, 2 Cox, 271.

(o) East India Company v. Nuthumbadoo Veerasawmy Moodelly, 7 Moo. P. C. C. 482, 497.

(p) 1 Bro. P. C. 345.

the strength of it obtained a verdict finding him not to be seised of the lands in question : but notwithstanding all these circumstances, a plea of the Statute of Frauds was allowed.

§ 416. But where the agreement comprises acts between A. and B. and B. and C., and A. may be supposed to have an interest, or to have stipulated in respect of the acts between B. and C., part performance of this part of the contract renders it binding on A. This seems to be illustrated by the case of Parker v. Smith.^(q) There a lessor entered into a parol agreement with a colliery company, holding a lease from him, and consisting of four partners, of whom two were his sons, that one of his sons and one of the other partners should retire and leave the benefit of the business to the remaining two, and that thereupon he would consider the subject of rent, which it was found was put too high in the original lease, and refer the subject to a competent person, and on the report of that person being made, would, if the report should seem right, adopt it, and grant a new lease. The dissolution of partnership so agreed on took place, and the two continuing partners released the others: these acts being referable only to the agreement, were held to take the case out of the Statute of Frauds, and specific performance of the agreement to *grant the lease was enforced against the lessor's assignees in [*188] bankruptcy.

§ 417. (4) The effect of acts of part performance being as we have seen, to show that there is an agreement, and to let in parol evidence of the terms of that agreement, it becomes necessary in the next place to inquire on what evidence the court will act.

§ 418. In the first place, it is to be observed, that if there be any such conflict of evidence, as leaves any uncertainty in the mind of the court as to what the terms of the parol contract were, its interference will be refused.^(r) Therefore, where there were variations between the evidence of an only witness and a memorandum of the contract in a pocket-book which was produced, the witness mentioning 1000 guineas exclusive of timber as the price, whilst the pocket-book made no mention of the timber, the court dismissed the bill.^(s) And where an agreement was alleged by the bill, another proved by the plaintiff's one witness, and a third admitted by the two defendants,—although specific performance was decreed according to the agreement set up by the answers, Lord Rosslyn considered that in strictness, the bill ought to have been dismissed.^(t) The inclination of Lord Cottonham's mind seems to have been to struggle with apparently conflicting evidence, rather than to dismiss the bill, where there had been part performance.^(u) And in a recent case,^(v) it was observed by Sir George Turner that "there are cases in which the court will go to a great extent in order to do justice between the parties where possession has been taken, and there is an uncertainty about the terms of the contract."

(q) 1 Coll. C. C. 608.

(r) Lindsay v. Lynch, 2 Sch. & L. 1.

(t) Mortimer v. Orchard, 2 Ves. jun. 243.

(u) Mundy v. Jolliffe, 5 My. & C. 167.

(v) East India Company v. Nuthumbadoo Veerasawmy Moodelly, 7 Moo. P. C. 482, 497. See ante, § 204.

(s) Reynolds v. Waring, You. 346.

*§ 419. Where the variation between the contract alleged and [*_189] that proved consists in the plaintiff's admission of some term against himself, or omission of some term in his favour :*(w)* or where the term which constitutes the variation is immaterial, from its being merely the expression of what would be implied or from its having been actually performed, the court will not refuse the evidence of the agreement. So that where a tenant alleged that he was to pay taxes and do necessary repairs, and the contract proved did not contain this term :*(x)* and again where a plaintiff admitted an agreement to drain the lands generally, and he only proved one to drain where necessary, and he also stated as part of the agreement that he was to lay certain arable land into pasture, which was not proved by the evidence :*(y)* in each of these cases, the variation was considered as no reason for rejecting the evidence of the contract.*(z)*

§ 420. The existence of a signed but incomplete agreement is no obstacle in the way of proving the additional terms by parol where there is part performance :*(a)* for the whole might have been proved by parol, and therefore still more may part. The doctrine of parol variation has of course no application, where by reason of acts of part performance parol evidence is admissible.

§ 421. An admission of the agreement in the answer of course precludes the necessity of further proof : and the fact that the answer prays the benefit of the Statute of Frauds is immaterial, in case of part performance, for that excludes the operation of the statute.*(b)*

§ 422. Where the agreement is positively denied by the answer, and is proved only by the unsupported evidence of one witness, that will not be allowed to prevail : but where *the one witness is corroborated [*190] in his statements by circumstances, the proof may prevail over the denial.*(c)*

§ 423. Where one agreement is alleged by the bill and another set up by the answer, and the acts of part performance are consistent alike with the one agreement and the other, Lord Redesdale seems to have considered that there was no case to admit proof of a further agreement, and that the acts of part performance must be such as to show them to have been done in pursuance of the very same agreement as that alleged.*(d)* It may however be submitted, that this view of the case is inconsistent with the general doctrine of the operation of the acts of part performance : that they open the whole question of the terms of the agreement to parol evidence : and that as a written agreement where there are acts of part performance may be added to by parol,*(e)* so an agreement set up by the answer may be modified by parol. If this were not so, the plaintiff would be at the mercy of the defendant, for whereas if he simply denied the agreement, the plaintiff would have an opportunity of proof

(w) Clifford v. Turrell, 1 Y. & C. C. 138.

(x) Gregory v. Mighell, 18 Ves. 328.

(y) Mundy v. Jolliffe, 5 My. & Cr. 167.

(z) See ante, § 174.

(a) Sutherland v. Briggs, 1 Ha. 26, 35.

(b) Cooth v. Jackson, 6 Ves. 12.

(c) East India Company v. Donald, 9 Ves. 275 ; Morphett v. Jones, 1 Sw. 172 ; Toole v. Medlicott, 1 Ball & B. 393.

(d) Lindsay v. Lynch, 1 Sch. & Lef. 1. See ante, § 385.

(e) Sutherland v. Briggs, 1 Ha. 26.

by parol; when he set up some other agreement, all that evidence would be excluded.(f)

§ 424 It is perhaps not entirely decided whether the court can in any case decree an inquiry into the terms of a contract, when it has not been sufficiently proved to enable the court to make a final decree upon the evidence before it. Lord Manners(g) strongly expressed an opinion that the court has no such jurisdiction, a view which seems to have met with the approval of the highest authorities.(h)

*CHAPTER XII.

[*191]

OF MISREPRESENTATION.

§ 425. A MISREPRESENTATION, having relation to the contract, made by the one of the parties to the other of them, is a ground for refusing the interference of the court in specific performance at the instance of the former party; and may in certain cases be a ground for its active interference in setting aside the contract at the instance of the latter.(a) Representations are most usually by word, but they may be by act, as, for instance, by the performance of fraudulent experiments, on the faith of which a contract was entered into for a license under a patent.(b)

§ 426. Such misrepresentations are resolvable into the following elements, namely,—first, the statement actually untrue; secondly, the fact that the party making the statement did not know it to be true; thirdly, the intent in the party making the statement to induce the other party to enter into the contract; fourthly, the reliance on the statement by the party to whom it is made; fifthly, the statement having such a relation to the contract as that the statement being false makes the contract unconscionable.

§ 427. It will be desirable to discuss these points separately; and, in doing so, to consider whether the *misrepresentation in question is alleged by way of defence to a suit for specific performance, or [*_192] defence to an action on the contract at law, or as the ground for an action of deceit at law, or for the rescission of a contract in equity; for, whilst the same ingredients are requisite for either of the two latter proceedings,(c) it will appear that somewhat less will suffice to prevent the active interference of the court in specific performance. The object of the pre-

(f) Cf. also the case of *Tomkinson v. Straight*, 17 C. B. 697, stated ante, § 386.

(g) *Savage v. Carroll*, 2 Ball & B. 451, and see *Seton Decrees*, 566, where it is laid down that “an inquiry should not be directed as to facts which are the foundation of the relief.”

(h) *Sug. Vend.* 126; *Story, Eq. Jur.* § 764.

(a) *Edwards v. M'Leay, Coop.* 308; *S. C. 2 Sw.* 287; *Gibson v. D'Este*, 2 Y. & C. C. C. 542, reversed in *D. P. s. n. Wilde v. Gibson*, 1 Ho. Lords, 605; *Sug. Law of Prop.* 614.

(b) *Lovell v. Hicks*, 2 Y. & C. Ex. 46.

(c) *Attwood v. Small*, 6 Cl. & Fin. 232, 395, 444; *Lovell v. Hicks*, 2 Y. & C. Ex. 46, 51.

sent chapter being to consider misrepresentations in relation to specific performance, it is of course only incidentally and partially discussed in the other relations above alluded to.

§ 428. (1) The first point calls for little remark; for it is obvious that unless the statement be actually untrue, there can be no misrepresentation.

§ 429. (2) With regard to actions on the case for deceit at law, and therefore to suits in equity for setting aside the contract, if the statement be in fact false, but the party making it believes it to be true, there will be no fraud sufficient to induce the interference of the court.(d) It is not, however, necessary to show that the party knew the representation to be false; it is enough if it was false, and he did not at the time believe it to be true, and that he made it for a fraudulent purpose.(e)

§ 430. The same principle applies where misrepresentation is alleged as a defence to an action on a contract. In a case(f) on a covenant in a separation deed, to which fraud was pleaded, Maule, J., said, "I conceive that if a man, having no knowledge whatever on the subject, takes upon himself to represent a certain state of facts to exist, he does so at [*193] his peril: and if it be done either with a view *to secure some benefit to himself, or to deceive a third person, he is in law guilty of a fraud, for he takes upon himself to warrant his own belief of the truth of that which he so asserts."

§ 431. But where there is no fraudulent intent and no actual knowledge that the statement is untrue, this is not a defence to an action on the contract at law; so that where an agent, without designing to deceive, made a representation which was false, but which he did not know to be so, whilst the principal had the knowledge of the actual facts, but did not make the representation, it was held that there was no fraud, and that the misrepresentation therefore furnished no defence.(g)

§ 432. In equity, however, it furnishes a good defence to a suit for specific performance, that the plaintiff made a representation which was not true, though without knowledge of its untruth, and this even though the mistake be innocent; for a man, before making a representation, ought not only not to know it to be untrue, he ought to know that it is true.(h) So in a case where a trustee was charged by the court in respect of a misrepresentation made to a purchaser, and the trustee alleged that he did not at the time recollect the fact thus misrepresented, Sir William Grant said, "the plaintiff cannot dive into the secret recesses of his (the trustee's) heart, so as to know whether he did or did not recollect the fact, and it is no excuse to say that he did not recollect it."(i) In like

(d) *Early v. Garrett*, 9 B. & C. 928; *Freeman v. Baker*, 5 B. & Ad. 797; *Moens v. Heyworth*, 10 M. & W. 147. (e) *Taylor v. Ashton*, 11 M. & W. 401.

(f) *Evans v. Edmonds*, 13 C. 777, 786.

(g) *Cornfoot v. Fowke*, 6 M. & W. 358, discussed and explained in the *National Exchange Company v. Drew*, 2 M'Q. 103. See also *Fuller v. Wilson*, 3 Q. B. 58, and in *Cam. Scae. as Wilson v. Fuller*, 3 Q. B. 68, which was an action for deceit, ultimately decided on the ground that the cause of the injury was the plaintiff's own misapprehension.

(h) *Ainslie v. Medlycott*, 9 Ves. 13, 21; *Wall v. Stubbs*, 1 Mad. 80.

(i) In *Burrowes v. Lock*, 10 Ves. 476; accordingly *Price v. Macaulay*, 2 De G. M. & G. 339.

manner, it may be added that in the cases of agents rendering [*194] *themselves personally liable, it is the same whether they represent what they know to be false, or what they do not know to be true.(k)

§ 433. Though a person making a representation may at the time believe it to be true and have made it innocently, yet if, after discovering that it was untrue, he suffers the other party to continue in error, and to act on the belief that no mistake has been made,—this from the time of the discovery becomes, in the contemplation of a court of equity, a fraudulent misrepresentation, even though not so originally.(l)

§ 434. (3) The misrepresentation must have been made in relation to the contract in question, and with a view to induce the other party to enter into it; it must be *dolus dans locum contractui*. Hence, unless under very special circumstances, it must have been made at the time of the treaty,(m) and not have relation to some collateral matter, or other relation or dealing between the parties.(n)

§ 435. This point was much discussed in a recent case(o) in the house of lords. There, a tottering joint stock company had put out flourishing annual reports of its condition, and shortly after the last of these reports, and with a view to prevent its shares falling in the market and to counteract certain unfavourable rumors, the company, through their manager, urged the defenders to purchase additional shares in the concern, and assured them that *the company would advance the necessary funds, and that the stock should be held until it could be sold at a profit, without the defenders being called on to pay any money: the shares became valueless, and the company sued for the money advanced, to which the defenders pleaded the fraud of the company: to this plea it was, amongst other things, objected that the loan was one independent transaction, and the purchase another, and that the alleged misrepresentation in the purchase did not vitiate the loan. But it was held by their lordships that the defence was good, Lord Cranworth putting it on the ground that the transaction did not constitute a loan in the ordinary sense of the word, but a special contract by the company to purchase for the defenders, to be repaid only in a particular manner; and Lord St. Leonards holding that the purchase and the loan were one transaction, though consisting of two parts,—that if there had been no loan there would have been no purchase, and if there had been no purchase there would have been no loan.

§ 436. But it is not essential to make a misrepresentation operate as such that it should have been made from a corrupt motive of gain to the person making it, or a wicked motive of injury to the person to whom it is made: therefore where a person, not authorized to do so, accepted a

(k) Per Alderson, B., in *Smout v Ilbery*, 10 M. & W. 10.

(l) *Reynell v. Sprye*, 1 De G. M. & G. 660, particularly per Lord Cranworth, p. 709.

(m) Per Sir J. Leach in *Harris v. Kemble*, 1 Sim. 122. As to the question whether a representation by an Insurance Company in a published prospectus can be presumed, in the absence of specific evidence, to have been the basis of an insurance effected with them, see *Wheelton v. Hardisty*, 26 L. J. Q. B. 265.

(n) *Harris v. Kemble*, 1 Sim. 111, 128, overruled, but as to the application and not as to the principle, 5 Bli. N. S. 730. See also *Dawes v. King*, 1 Stark. 75.

(o) *The National Exchange Company v. Drew*, 2 M'Q. 103.

bill as by the procuration of the drawee, doing so in the absence of the drawee, and in the belief that the drawee would have accepted it, and without any fraud in fact, he was held liable as for a fraud in law, inasmuch as he had made a misrepresentation, knowing it to be untrue, in a way calculated to make another act on the faith of it to his damage, and the damage had actually occurred.(p)

[*196] § 437. (4) Another essential circumstance to misrepresentation *as a defencse to specific performance, is that it was in reliance upon the statements in question that the party to whom they were made entered into the contract. In *Attwood v. Small*,(q) which was a case for the rescission of the contract (and for this point the plaintiff's case for rescission and the defendant's case against specific performance seem alike,) Lord Brougham, after referring to the earlier cases, said, "Now, my lords, what inference do I draw from these cases? It is this, that general fraudulent conduct signifies nothing; that general dishonesty of purpose signifies nothing; that attempts to overreach go for nothing, unless all this dishonesty of purpose, all this fraud, all this intention and design can be connected with the particular transaction, and not only connected with the particular transaction, but must be made to be the very ground upon which this transaction took place, and must have given rise to this contract."

§ 438. In considering whether the defendant relied on the misrepresentation of the plaintiff, the court will discriminate between such representations as are in conscience a part of the bargain, whether incorporated into the legal contract or not, and mere vague commendations, as the holding out of mere hopes or expectations which ought to put the other party upon further inquiry; and in judging of this, it is important to consider whether the thing undertaken or stated lies in the power or knowledge of the party making the representation, or whether it lies beyond his power or knowledge. Thus, for instance, with regard to mines, a distinction will be drawn between a specific account of what was to be seen in the mine, and a general description of its prospects and capabilities, which from the very nature of the property must be problematical and doubtful.(r)

[*197] *§ 439. On this principle where an advowson was sold by auction, and the particulars stated that a voidance of the preferment was likely to occur soon, but made no mention of the present incumbent, and the auctioneer at the sale stated in explanation that the living would be void on the death of a person aged eighty-two; and in fact the then incumbent was only thirty-two years of age; Sir William Grant held the representation made by the particulars so vague and indefinite that its only effect ought to have been to put the defendant upon making inquiries, and accordingly granted specific performance.(s) And so again, the

(p) *Polhill v. Walter*, 3 B. & Ad. 114; *Gibson v. D'Este*, 2 Y. & C. C. C. 542; but see *S. C. in D. P. s. n.*; *Wilde v. Gibson*, 1 Ho. Lords, 605; *Sudg. Law of Prop.* 614.

(q) 6 Cl. & Fin. 447. Consider *Wheelton v. Hardisty*, 26 L. J. Q. B. 65; ante, § 434, n.

(r) *Jennings v. Broughton*, 17 Beav. 234.

(s) *Trower v. Newcome*, 3 Mer. 704.

representation that land was uncommonly rich water-meadow, whereas, in fact, it was very imperfectly watered, was held not to be a bar to performance.(*t*)

§ 440. But generally speaking, in statements made by the vendor as to property, he is bound to make them free from all ambiguity, and the purchaser is not bound to take upon himself the peril of ascertaining the true meaning of the statement.(*u*)

§ 441. Besides the vagueness of the representation, there are other grounds upon which the court will conclude that it was not relied upon by the party to whom it was made : these were discussed by Lord Langdale in the case of *Clapham v. Shilito*.(*v*) His lordship there said :(*w*) “ Cases have frequently occurred in which upon entering into contracts misrepresentations made by one party have not been, in any degree, relied on by the other party. If the party to whom the representations were made himself resorted to the proper means of verification, before he entered into the contract, it may appear that he relied *upon the result of his own investigation and inquiry, and not upon the representations made to him by the other party : or if the means of investigation and verification be at hand, and the attention of the party receiving the representations be drawn to them, the circumstances of the case may be such as to make it incumbent on a court of justice to impute to him a knowledge of the result, which, upon due inquiry, he ought to have obtained, and thus the notion of reliance on the representations made to him may be excluded. Again, when we are endeavouring to ascertain what reliance was placed on representations, we must consider them with reference to the subject-matter and the relative knowledge of the parties. If the subject is capable of being accurately known, and one party is, or is supposed to be possessed of accurate knowledge, and the other is entirely ignorant, and a contract is entered into after representations made by the party who knows, or is supposed to know, without any means of verification being resorted to by the other, it may well enough be presumed that the ignorant man relied on the statements made to him by him who was supposed to be better informed : but if the subject is in its nature uncertain,—if all that is known about it is matter of inference from something else, and if the parties making and receiving representations on the subject have equal knowledge and means of acquiring knowledge, and equal skill, it is not easy to presume that representations made by one would have much or any influence upon the other.”

§ 442. The fact that resort has been had to other means of knowledge is, we have seen, one ground on which courts will hold that the misrepresentation was not relied on. “ If,” said Lord Holt, alluding to the circumstances of the case before him,(*x*) “ the vendor gives in his par-

(*t*) *Scott v. Hanson*, 1 Sim. 13 ; S. C. 1 R. & My. 128. See also on this principle, *Fenton v. Browne*, 14 Ves. 144 ; *Brealey v. Collins*, You. 317 ; *Brooke v. Roundthwaite*, 5 H. 298.

(*u*) *Martin v. Cotter*, 3 Jon. & L. 496, 507 ; *Wall v. Stubbs*, 1 Mad. 80.

(*v*) 7 Beav. 146.

(*w*) pp. 149, 150.

(*x*) *Lysney v. Selby*, 2 Lord Rayd. 1118, 1120.

[*199] ticular of the rents, and the vendee says he will trust him and *inquire no farther, but rely upon his particular; then, if the particular be false, an action will lie; but if the vendee will go and inquire further what the rents are, there it seems unreasonable he should have any action, though the particular be false, because he did not rely upon the particular." It was on this ground that the house of lords ultimately decided the celebrated case of *Small v. Attwood*.^(y) The British Iron Company had sent a deputation of their directors down to Mr. Attwood's works for the express purpose of verifying his representations, and they expressed their satisfaction with the proofs produced: by this line of conduct they precluded themselves from being able to rely on any previous misrepresentations, for if a purchaser chooses to judge for himself, and does not avail himself of all the knowledge and means of knowledge open to him, he will not afterwards be allowed to say that he was deceived by the representations of the vendor. The case was a suit for rescission, and not a defence to a specific performance; but for the present point these seem to be alike.

§ 443. The principle is further illustrated by the recent case of *Jennings v. Broughton*,^(z) where the plaintiff, having bought shares in a mine, afterwards sought to set aside the sale on the ground of misrepresentation as to the state of the mine; but he having visited the mine himself, and the alleged misstatements being such as he was competent to detect, the court held that his purchase of shares had not been made in reliance on the representations, and the bill was dismissed both by the master of the rolls and the court of appeal.

§ 444. And where a purchaser complained of a representation that the woods sold had yielded £250 per annum on an average of fifteen years, on the ground that though they might in fact have done so, yet that they would not *have done so in a fair course of husbandry, his objection was held to be displaced by proof that he had been put in possession of a paper from which he might have ascertained that the woods had been unequally cut.^(a)

§ 445. The allegation of misrepresentation may also be effectually met by proof that the party alleging it was from the beginning cognizant of all the matters complained of, or after full information concerning them continued to act on the footing of the contract, or to deal with the property comprised in it as if held under the contract: as for instance, where a lessee of a mine after knowledge of alleged misrepresentation, continued to work it.^(b)

§ 446. On this principle it is, that where a misrepresentation has been made by the vendor with regard to some patent defect in the thing sold, and it is proved that the purchaser had seen the thing sold, so that this defect must have been known to him, he will not be able to avail himself of the defect as a bar to specific performance. This was decided by Sir William Grant in the case of *Dyer v. Hargrave*,^(c) where a farm was

(y) 6 Cl. & Fin. 232. (z) 5 De G. M. & G. 126, affirming S. C. 17 Beav. 234.

(a) *Lowndes v. Lane*, 2 Cox, 363.

(b) *Vigors v. Pike*, 8 Cl. & Fin. 562; per Lord Cottenham, p. 650.

(c) 10 Ves. 505.

described as all lying within a ring-fence, whereas it did not in fact so lie; but it was clearly proved that the defendant had lived in the neighbourhood all his life, had seen the farm before purchasing it, and must have known whether it did lie in a ring fence or not; and on these facts the master of the rolls decided that the defendant was clearly excluded from insisting upon the misrepresentation as a defence. This principle will of course only apply where the thing in respect of which the representation is made is one perfectly visible to everybody.(l)

§ 447. This case was supported by Sir William Grant by the analogy of warranties at law, in which, however *general, defects apparent at the time of the bargain are not included, because they [*201] can form no subject of deceit or fraud: so that, for example, a person who buys a horse knowing it to be blind in both eyes, cannot sue for this defect on a general warranty of soundness.(e)

§ 448. But for the vendor thus to countervail the effects of his own misrepresentation, the evidence of knowledge in the other party must be conclusive; he "must show very clearly that the purchaser knew that to be untrue which was represented to him as true; for no man can be heard to say that he is to be assumed not to have spoken the truth."(f)

§ 449. Such being the proof required, it is very certain that the mere circumstance of other means of knowledge being open to the purchaser will not have this effect, even though, independently of any statement, the party relying on the representation would in law have been taken to have had notice of the contrary. The doctrine of notice has no application where there has been a representation as to the fact of which notice would be implied:(g) the proof must go further, and clearly show the purchaser to have had communicated to his mind information of the real state of facts.(h)

§ 450. Therefore where a distinct representation has been made, it will not be countervailed by any general statement or any circumstances from which an inference inconsistent with the representation might be drawn, even though in the absence of such representation they might be sufficient to put the other party on inquiry.(i)

* 451. Nor will it prevent the effect of a misrepresentation [*202] that the party making it recommended the other to consult his friends and professional advisers, for "no man can complain that another has too implicitly relied on the truth of what he has himself stated."(k)

§ 452. Thus where a misrepresentation is made by a vendor in respect of a lease, of the covenants in which the purchaser would by law be implied to have notice, the vendor will be equally bound by his statement as if no such implication arose.(l)

(d) *Grant v. Munt, Coop.* 173; post, § 563 et seq.

(e) *Bayly v. Merrel, Cro. Jac.* 386; *Margetson v. Wright*, 7 Bing. 603.

(f) *Per Knight Bruce, L. J.*, in *Price v. Macaulay*, 2 De G. M. & G. 346; *Wilson v. Short*, 6 Ha. 366, 378; *Dyre v. Hargrave*, 10 Ves. 505.

(g) *Drysdale v. Mace*, 2 Sm. & Gif. 225, 230.

(h) *Price v. Macaulay*, 2 De G. M. & G. 339. See also *Gibson v. D'Este*, 2 Y. & C. C. 542, 572. (i) *Wilson v. Short*, 6 Hare, 366, 377.

(k) *Reynell v. Sprye*, 1 De G. M. & G. 660, 710; *Dobell v. Stevens*, 3 B. & C. 623.

(l) *Van v. Corpe*, 3 My. & K. 269; *Flight v. Barton*, id. 282; *Pope v. Garland*, 4 Y. & C. Ex. 394, 401.

§ 453. On the same principle it was decided that where a vendor represented the house to be substantially and well built, and it proved to be the contrary, the vendor was not entitled to specific performance, though the defendant might of course have inquired into its actual state.(m)

§ 454. In *Harris v. Kemble*,(n) there was a contract consequent upon certain misrepresentations as to the profits of a theatre : Sir J. Leach was of opinion that these representations being manifestly founded on accounts which were equally open to both parties (they being joint owners of the theatre,) and being justified by the accounts, did not avoid the contract ; but his decision was overruled by Lord Chancellor Lyndhurst, and afterwards by the house of lords, on the ground that the representation was made with a view to the agreement, and that the accounts were so kept as to render it difficult without employing an accountant to draw any certain conclusion from them.

§ 455. The circumstance that the vendor sold "with all faults," though it may serve to put the purchaser on his guard, will not enable the vendor to say that the purchaser did not rely on his representation, [*203] or prevent the purchaser *from avoiding the sale, if that representation were false.(o)

§ 456. The principle that, in order to render a misrepresentation operative, there must be reliance on it by the party to whom it was made, applies to the case of the assignment of a contract originally affected by such a circumstance; for it seems that if A. contract with B., and in so doing there are circumstances of fraud on the part of A. which would prevent his enforcing the contract against B., but B. assigns the contract to C., on whom no fraud is practised and who is not affected by the original misrepresentation, in such circumstances the contract might be enforced against C.,(p) for he placed no reliance on the misrepresentation made to B.

§ 457. (5) It is, as already stated, necessary to constitute a misrepresentation which will prevent a specific performance, that the statement in question shall be so material to the contract built on it that, if the statement be false, the contract becomes one which it would be unconscionable for the party having made the statement to enforce. In other words, the misrepresentation must be shown to have operated to the prejudice of the defendant.(q) Therefore, where A. induced a purchaser to think that he was contracting with B. through his (A.'s) agency, whereas he was, in fact, contracting with A. himself, but there was nothing to induce the belief that he would not have contracted on the same terms with A., or that he had sustained any loss or inconvenience from acting under the mistake, the court enforced performance of the contract.(r) But it is sufficient if the misrepresentation operate to the prejudice of the defendant to a very small extent.(s)

(m) *Cox v. Middleton*, 2 Drew, 209.

(n) 1 Sim, 111, particularly 120; S. C. 5 Bl. N. S. 730.

(o) *Schneider v. Heath*, 3 Cam. 506. See also post, § 571.

(p) *Smith v. Clarke*, 12 Ves. 477, 484. (q) See *Polhill v. Walter*, 3 B. & Ad. 114.

(r) *Fellowes v. Lord Gwydyr*, 1 Sim. 63; S. C. 1 R. & My. 83; cf. *Flint v. Woodin*, 9 Ha. 618.

(s) *Cadman v. Horner*, 18 Vesey, 10. The distinction of the casuists between

*§ 458. Where fraud or misrepresentation, to whatever extent it may go, has been established, it operates as a personal bar to the relief,^(t) and the party guilty of it cannot enforce the contract, even if he waive the portion of it affected by the misrepresentation. In a case^(u) where there was a misrepresentation which the master of the rolls considered not to have been wilful, but to have arisen from misunderstanding as to the surrender of a lease on part of the property which was to be exchanged, and the plaintiff offered to take the land subject to the lease, and thus, as he contended, to abide by the agreement, exonerated from what was affected by the misrepresentation; so that the question distinctly arose whether the misrepresentation avoided the contract *in toto* or only *quoad hoc*,—Sir Thomas Plumer,^(v) said, “there is no authority anywhere, no case where the court has, when misrepresentation was the ground of a contract, decreed the specific performance of it; and nothing would be more dangerous than to entertain such a jurisdiction. The principle upon which performance of an agreement is compelled requires that it must be clear of the imputation of any deception. The conduct of the person seeking it must be free from all blame: misrepresentation, even as to a small part only, prevents him from applying here for relief. The reason of this is obvious; if it be so obtained, the contract is void both at law and in equity. Where an agreement has been obtained by fraud, is the effect to alter it partially, to cut *it down, or modify it only? No, it vitiates it *in toto*; and the party who has been drawn in is totally absolved from obligation. If so, what equity has the other party, who by his misconduct has lost one contract, to call on the court for his benefit to make a new one? If the defendant were willing to consent to it and to enter into a new agreement, it would be a different case; but if he refuses, if he insists that he is absolved from it, what equity can there be in favour of the other?”

*C H A P T E R X I I I.

[*206]

OF FRAUD.

§ 459. FRAUD is of course a larger word than misrepresentation, and includes in it not only misrepresentation on the part of the vendor, which we have already considered, but also the unconscionable and deceptive dealing of either party to any contract.

§ 460. Fraud comes before the courts in several relations. It comes

error antecedens and *concomitans* was the same as that referred to in this section. Error “dividitur in *antecedentem* qui dat causam contractui, ita ut eo absente, contractus non fieret, et in *concomitantem*, seu incidentem, quo etiam absente adhuc contractus iuiretur. . . . Si error circa solam qualitatem accidentalem contingit, quae simul cum substantia rei non ingreditur objectum substantiale contractus, hic validus omnino persistet.” Mariani Examen, § 279.

(t) Harris v. Kemble, 5 Bl. N. S. 730, 751.

(u) Viscount Clermont v. Tasburgh, 1 J. & W. 112.

(v) pp. 119, 120.

before courts of law as a defence to an action on the contract, or as the ground for an action for deceit: it comes before courts of equity as a ground for setting aside an executed contract, as a defence to a suit for specific performance, or, lastly as forming an exception to the Statute of Frauds, in which relation it is considered in the chapter on that statute.

§ 461. Under the chapter on misrepresentation we have seen that the suggestion of what is false is a ground for refusing specific performance, and also in certain cases for rescinding contracts: the same results flow from the suppression of a fact which is material, and which it is the duty of one party to the contract to communicate to the other.(a)

*§ 462. Therefore, where part of an estate sold was an encroachment on a common, in respect of which the lord's rights were not conclusively barred by time, and this fact was known to the vendor, and by him concealed from the purchaser, the court set aside an executed conveyance.(b)

§ 463. The authority of this case was followed and relied on by Knight Bruce, V. C., in the celebrated case of Gibson v. D'Este,(c) in which he decided that the knowledge in the vendor or her agent of a right of way over the property sold of which the purchaser was not aware, and which was not stated to him by the vendor or her agent, was a ground for the rescission of the contract. This decision was, however, overruled by the house of lords,(d) on the principle that, in order to set aside a purchase perfected by conveyance and payment of the purchase-money, there must be proof of the direct personal knowledge and concealment by the principal, and not merely by an agent, and that such proof was wanting in the case. This decision has by no means given universal satisfaction,(e) but whether correct or not, it leaves intact the doctrine established in Edwards v. M'Leay.

§ 464. Though the vendor is thus bound to make known to the purchaser any circumstance lessening the value of the estate, the purchaser is not under a corresponding obligation to communicate any circumstance which may enhance its value. So that, for instance, a man knowing of the existence of a mine under an estate, may validly deal *with the owner who is ignorant of this fact, without any communication of it.(f) And so where a first mortgagee, with power of sale, having entered into an arrangement not amounting to a binding contract for the advantageous sale of part of the mortgaged property, afterwards

(a) The question as to what facts which might influence the mind of one party it is the duty of the other, if knowing of them, to communicate, is one of great difficulty. It is discussed by Cicero in a well-known passage, (*De Offic. lib. iii. c. 12 et seq.*) culpable concealment being in his opinion "cum, quod tu scias, id ignorare emolumenti tui causâ velis eos, quorum intersit id scire," c. 13. The limitation put by Grotius on this principle would probably be adopted by our law, "non ergo generaliter sequendum illud ejusdem Ciceronis, celare esse, cum tu, quod scias, id ignorare, emolumenti tui causâ, velis eos quorum intersit scire: sed tum demum id locum habet, cum de iis agitur quae rem subjectam per se continentur." *De Jur. Belli ac Pacis, lib. ii. c. 12, s. 9.* See also Pothier, *Tr. du Contrat de Vente*, part ii. ch. 2.

(b) Edwards v. M'Leay, Coop. 308; 2 Sw. 287; Sug. Law of Prop. 649.

(c) 2 Y. & C. C. 542.

(d) S. N. Wilde v. Gibson, 1 H. o. Lords, 605. (e) Sug. Law of Prop. 614.

(f) Fox v. Mackreth, 2 Bro. C. C. 400, 420.

bought up at a reduced price the interest of the second mortgagee without informing him of the arrangements for sale, a bill to set aside the sale by the second mortgagee, on the ground of the suppression of information by the purchaser, was dismissed by the master of the rolls, and subsequently by the lord chancellor.(g) Nor is the purchaser liable to an action for deceit for misrepresenting the seller's chance of sale, or the probability of his getting a better price than that offered.(h) But in equity the purchaser must not make any false representation as to the estate, or go any further than silence; "A very little," said Lord Eldon, "is sufficient to affect the application of that principle. If a word, if a single word be dropped which tends to mislead the vendor, that principle will not be allowed to operate." Accordingly, in the case(i) before his lordship, the purchaser having made such suggestions of what was not true, the contract was set aside: and in a recent case,(k) where a solicitor bought of a person in difficulties who was selling without professional advice, and untruly represented the nature and title of the property as such that no one but a professional man would purchase it, specific performance was refused.

§ 465. We have already seen in other cases that suppression of a fact may be a circumstance influencing the discretion of the court, though not amounting to fraud.(l)

§ 466. The employment of a puffer at auctions is in *some circumstances regarded as fraud, which will prevent the enforcement [*209] of the contract made at the auction. The cases seem to fall under three heads, which it will be desirable to discriminate.

§ 467. (1) Where the sale is announced to be without reserve, this excludes any interference on the part of the vendor which can under any possible circumstance affect the right of the highest bidder to have the property knocked down to him, and that without reference to the amount to which the highest bidding shall go.(m) Therefore, the employment by the vendor in such a sale of one or more persons to keep up the price on his behalf amounts to fraud in the contemplation of all courts,(n) and is a bar to specific performance.(o) Where the vendors, who were assignees of an insolvent, put up his life-interest in certain property for sale by auction without reserve, having previously entered into an arrangement with a person whose wife was interested in remainder, that he should bid £35,000 and be the purchaser, unless a higher sum should be bid, and this fact was concealed, it was held to taint the sale to the defendant at the auction, though he purchased for £50,000.(p)

§ 468. (2) Where there is no declaration that the sale is without reserve, and the vendor employs one person to prevent the property going

(g) Dolman v. Nokes, 22 Beav. 402. (h) Vernon v. Keys, 12 East, 632.

(i) Turner v. Harvey, Jac. 169, 178; Davies v. Cooper, 5 My. & Cr. 270.

(k) Davis v. Abraham, Week. Rep. 1856-1857, 465, (Wood, V. C.)

(l) See ante, § 242.

(m) Per Lord Cottenham in Robinson v. Wall, 2 Phil. 375.

(n) Thorneit v. Haines; 15 M. & W. 367, where the earlier cases are cited.

(o) Meadows v. Tanner, 5 Mad. 34.

(p) Robinson v. Wall, 10 Beav. 61; S. C. 2 Phil. 372.

at an undervalue: this is not fraud in the contemplation of a court of equity,(q) but it is in that of a court of law.(r)

§ 469. Inasmuch as a contract, if originally void at law, ought not to be enforced by equity, the defendant in a suit for specific performance [*210] may avail himself of *the defence furnished by this fraud at law, formerly by means of a trial of the question at law.(s)

§ 470. (3) Even in the absence of any declaration that the sale is without reserve, the employment of two or more persons as puffers is in all courts considered as fraudulent, inasmuch as only one person can be necessary to protect the property, and the employment of more can only be to enhance the price.(t)

§ 471. Although companies and other corporations are from their nature incapable of fraud, their contracts are affected by the fraud or misrepresentation of their agents, the benefit of which is to be enjoyed by the company, in the same way as if the fraud or misrepresentation could be made by the abstraction called the corporation, and had, in fact, been so made by it.(u)

§ 472. The questions how far the fraud of the agent operates at law,(v) or in a suit for rescission,(w) are of considerable difficulty. But it seems to be clear on general principles, that it furnishes a sufficient defence to a suit for specific performance in equity.

§ 473. It is competent for the party imposed upon to waive the fraud, and acts of adoption may amount to a waiver: but to do so, they must be done with a full and entire knowledge of all the facts.(x) Thus where a defendant, having full information of the facts of the case, gave [*211] *a notice to rescind in case the plaintiff did not perform his part by a certain time, and by this notice the defendant offered to perform his part of the agreement, he was held to have waived any misrepresentations which might have been made.(y)

(q) *Smith v. Clarke*, 12 Ves. 477; *Woodward v. Miller*, 2 Coll. C. C. 279; *Flint v. Woodin*, 9 Ha. 618; *Bramley v. Alt*, 3 Ves. 620.

(r) Per Lord Wensleydale in *Thornett v. Haines*, 15 M. & W. 372; *Crowder v. Austin*, 3 Bing. 368.

(s) *Woodward v. Miller*, 2 Coll. C. C. 279.

(t) Per Lord Wensleydale in *Thornett v. Haines*, 15 M. & W. 372. See also *Rex v. Marsh*, 3 Y. & J. 331; *Bramley v. Alt*, 3 Ves. 620.

(u) *Ranger v. Great Western Railway Company*, 5 Ho. Lords, 72; *National Exchange Company v. Drew*, 2 M^cQ. 103.

(v) *Cornfoot v. Fowke*, 6 M. & W. 358; *National Exchange Company v. Drew*, 2 M^cQ. 103; *Fuller v. Wilson*, 3 Q. B. 58, 68; *Wilde v. Gibson*, 1 Ho. Lords, 605, 615; *Hern v. Nichols*, 1 Salk. 289; per Lord Lyndhurst in *Attwood v. Small*, 6 Cl. & Fin. 413.

(w) See § 463.

(x) Per Lord Lyndhurst in *Attwood v. Small*, 6 Cl. & Fin. 432. As to rescinding on the ground of fraud, see post, § 704.

(y) *Maebryde v. Weekes*, 22 Beav. 533.

*CHAPTER XIV.

[*212]

OF MISTAKE.

§ 474. THERE being two parties to every contract, it follows that mistake may be, 1st, the mistake of the defendant alone; or 2ndly, the common mistake of both plaintiff and defendant: or 3rdly, the mistake of the plaintiff alone. The first and second species will require discussion, as grounds of defence to a suit for specific performance; the second and third will both raise the question how far the plaintiff may enforce performance with a correction of the error. It will be necessary to consider mistake not only as a defence to a specific performance, but also to some extent as giving a plaintiff a right to a rescission or rectification of the contract.

§ 475. The principle upon which equity proceeds in those cases where mistake is the ground of defence, is this:—that there must be an agreement binding at law, but that this is not enough,—that to entitle the plaintiff to more than his legal remedy, the contract must be more than merely legal. It must not be hard or unconscionable; it must be free from fraud, from surprise, and from mistake: for where there is mistake, there is not that consent which is essential to a contract in equity: *non videntur qui errant consentire.*(a)

§ 476. Again, the Statute of Frauds has not affected the situation of a defendant against whom specific *performance is sought,(b) [*213] and it therefore leaves it open to him to produce any evidence for his purpose, which is not to establish an agreement, but to rebut an equity which the plaintiff insists has arisen out of an agreement.

§ 477. The cases of mistake have, it is true, seemed to present rather peculiar difficulties to the admission of parol evidence, because it has been argued that to do so is to overrule the Statute of Frauds and to contract the writing by parol. Its admission is however the settled doctrine of the court, and that not merely for purposes of defence to a specific performance, but, as we shall hereafter see, for the purpose of correcting the mistake. The question of its admission by way of defence was much debated in the case of the Marquis Townshend v. Stangroom,(c) where Lord Eldon said, “It cannot be said, that because the legal import of a written agreement cannot be varied by parol evidence, intended to give it another sense, therefore in equity, when once the court is in possession of the legal sense, there is nothing more to inquire into. Fraud is a distinct case, and perhaps more examinable at law: but all the doctrine of the court as to cases of unconscionable agreements, hard agreements, agreements entered into by mistake or surprise, which therefore the court will not execute, must be struck out, if it is true, that because parol evidence should not be admitted at law, therefore it shall not be admitted in equity upon the question, whether, admitting the agreement

(a) Dig. Lib. 50, tit. 17, t. 116.

(b) Per Sir Wm. Grant in Clarke v. Grant. 14 Ves. 519.

(c) 6 Ves. 328.

to be such as at law it is said to be, the party shall have a specific execution, or be left to that court, in which, it is admitted, parol evidence cannot be introduced."(d) "No person," said Lord Redesdale,(e) "shall be charged with the execution of an agreement, who has not, either by himself*or his agent, signed a written agreement; but the statute [*214] does not say that if a written agreement is signed, the same exception shall not hold to it that did before the statute."

§ 478. It follows from what has been stated, that where the defendant has been led into any mistake or error, the plaintiff cannot enforce the contract. Therefore, where in a sale by auction, the plaintiff had induced the defendant, who was the vendor, to think that he should not bid, and so put him off his guard, and the estate was, by a misapprehension on the part of the person employed to make the reserved bidding, allowed to be knocked down to the plaintiff, the court on the ground of mistake, though there was no fraud, declined to enforce the sale.(f) In another case(g) the estate was sold in lots: the particular stated that the timber on lots four and five was to be taken at a valuation: in addition to this, one of the conditions of sale specified that the purchaser was to take the timber (speaking generally without reference to any particular lot) at a valuation: Sir William Grant said that the express declaration as to lots four and five was so likely to mislead a purchaser as to the meaning of the conditions, that supposing that the right construction of the condition was that it applied to all the lots, it would be inequitable to enforce specific performance of the contract.

§ 479. In the preceding cases it will be observed that the plaintiff contributed to the mistake of the defendant. But in cases of mistake purely due to the defendant himself or his agent, the court will likewise refuse specific performance: indeed, it will furnish active assistance on the ground of the mistake of the party himself as well as of another, as is strongly shown by a case in which a professional man was relieved at [*215] his suit from an error in a *deed of his own drawing.(h) The cases too on intoxication furnish an analogy to this doctrine: for that circumstance is a ground of defence, though it may have been in nowise brought about by the plaintiff.(i)

§ 480. On this principle, where a person who was employed by the vendor of some property to bid for him, came into the auction-room, and after hearing the description of a lot which was perfectly different from that for which he was engaged to bid, kept bidding in a hasty and inconsiderate manner for, and ultimately purchased, this lot, which by his own gross mistake he thought to be the lot for which he was to bid, the court refused specifically to carry out the sale.(k)

§ 481. So where a vendor had revoked the authority of the auctioneer as to part of the property, and the auctioneer inadvertently sold the whole, the court refused specific performance, though the purchaser was justified

(d) p. 333. Accordingly *Manser v. Back*, 6 Hl. 443.

(e) In *Clinan v. Cooke*, 1 Sch. & Lef. 39.

(f) *Mason v. Armitage*, 13 Ves. 25; *Pym v. Blackburn*, 3 Ves. 34.

(g) *Higginson v. Clowes*, 15 Ves. 516. (h) *Ball v. Storie*, 1 S. & S. 210.

(i) See ante, § 244.

(k) *Malins v. Freeman*, 2 Ke. 25.

in believing that he purchased all he claimed by his bill.(l) Again, where a description of parcels was prepared by the vendor's solicitor from a previous description, which had been prepared by another solicitor on the report of a surveyor, and the description turned out to be erroneous as to quantity, the court would not enforce the sale on the vendor, unless the case were one for compensation, and the purchaser would submit to it.(m) And where a vendor sold a manor, being at the time ignorant of its exact extent, and both parties at the time of the contract believed that what it included was something different from what it really did, and the manor proved to comprise valuable property that the vendor did not know to be within it, the purchaser's bill for specific performance was dismissed.(n)

*§ 482. Where a defendant was tenant for life of an estate, under a settlement which contained a proviso, that if he purchased and settled an estate in fee simple in possession in some convenient place or places of a value equal to or greater than the estate comprised in the settlement, then this estate should become the property of the tenant for life; and he, imagining that he had, with the concurrence of his wife, an absolute power of disposition over the settled estate, entered into a contract for sale: Sir Thomas Plumer refused to carry it into effect by an exercise of the proviso in the settlement, considering that such a performance of the contract would be attended with great difficulty, and that the defendant had not contracted for that purpose or with that intention.(o)

§ 483. We may now proceed to consider the effect of a parol variation set up by the defendant as a ground for refusing the specific performance of a written agreement alleged by the plaintiff.

§ 484. (1) Where the parol variation set up by the defendant shows that after the parties to the contract had mutually agreed with one another, an error occurred in the reduction of the agreement into writing, and it appears that the written agreement varied according to the defendant's contention represents the true contract between the parties, the court will, it seems, enforce specific performance of the contract so varied.

§ 485. Thus, where a bill was brought for the specific performance of an agreement to grant a lease at a rent of £9 per annum, and the defendant insisted that it ought to have been a term of the agreement that the plaintiff should pay all taxes: Lord Hardwicke granted specific performance, and directed that the terms of the verbal agreement should be carried out by the covenants to be inserted in the lease.(p) Again, where a bill prayed the execution of an *agreement for the sale of an estate, and the defendant resisted, and proved parol declarations by the auctioneer as to a right of common, and that previously to the sale the particular had been altered as to a certain right of common; the plaintiff proposed that his bill should be dismissed, but the lord

(l) *Manser v. Back*, 6 Ha. 443.

(m) *Leslie v. Tompson*, 9 Ha. 268. See also per Lord Cottenham in *Alvanley v. Kinnaird*, 2 M.N. & G. 7; *Helesham v. Langley*, 1 Y. & C. C. C. 175; *Neap v. Abbott*, C. P. Coop. Rep., (1837-1838,) 333.

(n) *Baxendale v. Seale*, 19 Beav. 601.

(o) *Howell v. George*, 1 Mad. 1.

(p) *Joynes v. Statham*, 3 Atky. 388.

chancellor pursued the course which the defendant insisted on, which was specifically performing the agreement as contended for by the defendant, thus saving the expense of a cross-bill by him.(q)

§ 486. (2) But where the mistake or parol variation set up by the defendant does not show a mere mistake in the reduction of the contract into writing, but that one party understood one thing and the other another, there is no such contract as the court will enforce, and the plaintiff's bill is consequently dismissed.

§ 487. Therefore, where the court thought that the plaintiff and defendant had both been mistaken in a contract which contained certain ambiguous conditions as to the payment for timber, the bill was dismissed.(r)

§ 488. The same result follows where, from any other circumstance, the enforcement of the parol variation set up by the defendant would be unfair on either party. Accordingly, where the plaintiff set up a certain agreement which the defendant successfully resisted by parol evidence of a subsequent contract, and the plaintiff insisted on a performance of the agreement so set up; Sir John Strange refused to grant it, on the ground that it would be a surprise on the defendant to insist, under the prayer for general relief, on the performance of an agreement which was [*218] not put in issue by the record.(s) Again, where the *defendant proved a parol variation, and a great lapse of time had occurred, and compensation in respect of the term in dispute must have been allowed, if the contract had been enforced, for the period whilst the doubt about the terms of the contract had been subsisting, the plaintiff's bill was dismissed, but without costs.(t)

§ 489. (3) Where, as is often the case, the court does not decide that the parol variation falls clearly under either of the previous cases, but merely that the defendant contracted under mistake, it puts the plaintiff to his election either to have his bill dismissed, or to have the agreement executed with the parol variation.

§ 490. Thus, in *Higginson v. Clowes*,(u) where the conditions of sale were likely to have misled the defendant, and the defendant contended for a different construction from that of the plaintiff, Sir William Grant offered the plaintiff either to have his bill dismissed, or to have the contract executed on the defendant's construction. The counsel for the defendant contended that it was not competent to the plaintiff to have his bill dismissed, but that the defendant, without filing a cross-bill, might have a specific performance of the agreement. Sir William Grant, however, held that that right existed where the defendant's construction was adopted by the court; but that where, as in the case before him, the court did not decide that the defendant's construction was right, but only that he had contracted under a mistake created by the plaintiff, the bill was merely dismissed. In a subsequent

(q) *Fife v. Clayton*, 13 Ves. 546. See also *Gwynn v. Lethbridge*, 14 Ves. 585.

(r) *Clowes v. Higginson*, 1 V. & B. 524. See the judgment in this case observed on by Lord St. Leonards, *Vend. & Pur.* 133.

(s) *Legal v. Miller*, 2 Ves. Sen. 299. See Sir Wm. Grant's statement of this case in *Price v. Dyer*, 17 Ves. 364.

(t) *Garrard v. Grinling*, 2 Sw. 244.

(u) 15 Ves. 516.

suit(*v*) on the same agreement, where the parties were inverted, Sir Thomas Plumer, holding that there had been a mistake on both sides, refused specific performance on the construction of the defendant in the first suit.

§ 491. In *Ramsbottom v. Gosden*,(*w*) where the written *agreement confined a reference of expenses to those of conveyance, [*219] but the defendant proved by the parol evidence of the attorney that it was the intention of both parties that the plaintiff, who was the purchaser, should also pay the expenses of making out the defendant's title, Sir William Grant put the plaintiff to his election, either to have the agreement performed in the way contended for by the defendant, or to have his bill dismissed. And in a subsequent case,(*x*) where the defendant proved a parol variation, Sir William Grant again left the plaintiff to have a specific performance with this variation, or to have his bill dismissed.

§ 492. In a case(*y*) before Sir Thomas Plumer, where parol evidence was admitted on behalf of the defendants to show that an agreement by several persons to enter into bonds in £1500 ought to have been, for one joint-bond in that amount, by all : the vice-chancellor left it to the plaintiff to have his bill dismissed, or to take a decree for the joint-bond, or to take an issue on which the witnesses could be examined.

§ 493. In *Clarke v. Moore*,(*z*) where a landlord sought specific performance of an agreement for a lease, and the defendant set up a parol agreement to abate the rent, to which the plaintiff at the bar submitted, the lease was directed with the abatement : and in another case,(*a*) where it appeared that, in addition to the written contract, there had been an understanding between the agent of the plaintiff and the defendant as to payment for timber and certain expenses, the plaintiff consenting to adopt the terms as part of his contract, specific performance was granted.

*§ 494. And where there is a stipulation which one of the contracting parties may reasonably have understood to be implied [*220] in the contract, and did so understand,—as for instance, the insertion of a usual clause in a lease,—specific performance will not be enforced against such party except with such condition included.(*b*) And where a plaintiff sought relief on the ground of a covenant for renewal, which had for one hundred and fifty years been acted on in a manner different from its terms,—namely, by continually increasing the fine, and not the rent : the court held that the covenant could not be carried into execution according to its original terms, but might be on the plaintiff's submitting to a conscientious modification of it, to meet the circumstances of the case.(*c*) In this instance acquiescence, and not mistake, was the ground of the variation.

(*v*) 1 V. & B. 524.

(*w*) 1 V. & B. 165. Query, why was not specific performance enforced on the defendant's contention, as the error appears to have been merely in the reduction of the agreement into writing?

(*x*) *Clarke v. Grant*, 14 Ves. 519.

(*y*) *Lord Gordon v. Marquis of Hertford*, 2 Mad. 106. (*z*) 1 Jon. & L. 723.

(*a*) *London and Birmingham Railway Company v. Winter*, Cr. & Ph. 57.

(*b*) *Ricketts v. Bell*, 1 De G. & Sm. 335. (*c*) *Davis v. Hone*, 2 Sch. & Lef. 341.

§ 495. The parol variation may be alleged by the plaintiff for the purpose of offering the defendant his election ;(d) or it may be set up by the defendant by way of defence. If, in the absence of its being thus alleged, it comes out on the evidence, the court will direct an inquiry in regard to it before disposing of the case.(e) The court will also direct an inquiry where the variation is alleged by the defendant, and so far proved as to raise a suspicion of its existence, and yet not to satisfy the court.(f)

§ 496. From the great danger which would arise, the court will not allow a person to escape from a written agreement on slight parol evidence of mistake on his own part. So in one case,(g) Vice-Chancellor [*221] Wood said that the *oath of the defendant that he had inserted in his letter a term which he in fact omitted, and the oath of his agent that he had received instructions to the like effect, in letting the house, would not have sufficed ; but the defendant having in his letter referred to the offer as having been previously made to another party, and that party swearing that in the offer as made to him the term omitted in the subsequent offer was contained, the court held that sufficient evidence of mistake on the defendant's part had been given, and allowed the defence.

§ 497. Where both parties to a contract are at the time of the contract in mistake or error as to the matters in respect of which they are contracting, this will avoid the contract both at law and in equity, and the court will accordingly rescind the contract.

§ 498. Thus, in Calverley v. Williams,(h) Calverley brought his bill against Williams for a conveyance of seven acres of copyhold land, part of an estate sold by auction and purchased by the plaintiff as being comprehended in the advertisement of the sale, and described as in the possession of Groombridge. The defendant resisted this claim, on the ground that he did not intend to include those seven acres, or know that they were in the possession of Groombridge. Lord Thurlow, in giving judgment, said, “ No doubt, if one party thought he had purchased *bona fide*, and the other party thought he had not sold, that is a ground to set aside the contract, that neither party may be damaged ; because it is impossible to say, one shall be forced to give that price for part only which he intended to give for the whole, or that the other shall be obliged to sell the whole for what he intended to be the price of part only.”

§ 499. Where both vendor and purchaser, of an alleged estate in fee [*222] in remainder on an estate tail, were ignorant *that at the time the tenant in tail had suffered a recovery, so that in fact no estate in remainder existed, the court rescinded the contract.(i)

§ 500. But where neither party to the contract is in error as to the matters in respect of which they are contracting, but there is an error in the reduction of the contract into writing common to both the parties,

(d) Robinson v. Page, 3 Russ. 114.

(e) Parken v. Whitby, T. & R. 366; London and Birmingham Railway Company v. Winter, Cr. & Ph. 57; cf. Helsham v. Langley, 1 Y. & C. C. C. 175.

(f) Van v. Corpe, 3 My. & K. 269.

(g) Wood v. Searth, 2 K. & J. 33.

(h) 1 Ves. jun. 210; per Lord Erskine in Stapylton v. Scott, 13 Ves. 427.

(i) Hitchcock v. Giddings, 4 Pri. 135.

there the court interferes for the purpose of reforming the contract, and not of rescinding it.^(k) For by so doing neither party will be damaged : whereas by enforcing it as it stood, one party would be necessarily injured ; and by rescinding it, both would be deprived of the benefit of the contract.

§ 501. Accordingly in the case^(l) already stated, where the question was whether a certain seven acres were or were not included in the contract, Lord Thurlow, after stating that if the parties to the contract had mistaken each other in this respect, it must be rescinded, said : “ Upon the other hand, if both understood the whole was to be conveyed, it must be conveyed. But again, if neither understood so,—if the buyer did not imagine he was buying, any more than the seller imagined he was selling, this part, then this pretence to have the whole conveyed is as contrary to good faith upon his side, as the refusal to sell would be in the other case.”

§ 502. The jurisdiction of the court in this respect was clearly asserted by Lord Hardwieke in the case of Henkle v. Royal Exchange Assurance Company,^(m) which was a bill seeking, after the loss, so to rectify a policy, on the ground of common mistake, as to turn the loss on the insurer, which but for such variation must have been borne by the insured. “ No doubt,” said his lordship, “ but this court has jurisdiction to relieve in respect of a plain mistake in *contracts in writing, [*223] as well as against frauds in contracts ; so that if reduced into writing contrary to intent of the parties, on proper proof that would be rectified :” but for want of such proper proof the bill was dismissed.

§ 503. In another case,⁽ⁿ⁾ before the same judge, the captain of an East India ship, by articles of agreement, bargained and sold all his china ware and merchandize brought home in his last voyage, to the defendant : the articles of agreement were drawn up, from minutes made by the parties, by an attorney, who, misunderstanding the transaction, drew up the articles in an erroneous and absurd manner : the captain, who was the party aggrieved by the error, brought his bill for an account of what was due on the contract, and insisted on its rectification : he was allowed to give parol evidence of the error and of the usage of trade, to show the nature of the real transaction and the consequent mistake in the articles.

§ 504. Parol evidence is thus admitted to show the common mistake of both parties in reducing the contract into writing, and as the ground for rectifying it. “ I think it impossible,” said Lord Thurlow,^(o) “ to refuse, as incompetent, parol evidence which goes to prove that the words taken down in writing were contrary to the concurrent intention of all parties.”

§ 505. But in order thus to procure the rectification of a contract, the proof must be clear, irrefragable, and the “ strongest possible.”^(p) As

(k) Murray v. Parker, 19 Beav. 305.

(l) Calverley v. Williams, 1 Ves. Jun. 210. (m) 1 Ves. Sen. 317.

(n) Baker v. Paine, 1 Ves. Sen. 456 ; 6 Ves. Jun. 336, n.

(o) In Lady Sheilbourne v. Lord Inchiquin, 1 Bro. C. C. 341.

(p) Henkle v. Royal Exchange Assurance Company, 1 Ves. Sen. 317 ; per Lord

the point to be proved is that the concurrent intention of all the parties to the contract was different from that expressed by the written agreement, the court will attentively regard the admission or denial of the defendant as one of those parties,(q) and will attach so *much [*224] weight to it that where the plaintiff's proof is merely the recollection of witnesses, and there is no documentary or corroborating evidence, and the defendant denies the case set up by the plaintiff, it appears that the plaintiff is without remedy.(r)

§ 506. Where there is a writing by which the executed deed is to be rectified, and in that writing there is a term in respect of which there is a latent ambiguity, parol evidence may be admitted to explain it, and thus assist in the rectification of the deed.(s)

§ 507. It must not be supposed that it is every species of mistake which will furnish either a ground for defence to a suit for specific performance or for the reform or rescission of a contract.

§ 508. The maxim *Ignorantia legis non excusat*, though its operation in a highly complicated state of society and law is sometimes painful, may yet be traced back to the soundest principles of morals.(t) Accordingly it is acted on by courts of equity, which will neither set aside contracts for mistake in law,(u) nor allow such mistake to be set up as a ground for resisting specific performance of agreements in other respects free from objection.(v) Therefore no party to an agreement will be allowed to show that the legal result of it is not that which the parties intended,—as, for example, where A. agreed to sell an estate to B., and by the same writing B. agreed to sell an estate to A., and it was sought to be proved by parol evidence that these agreements, which in law were independent of one another, were *meant by the parties to [*225] be dependent, the evidence was rejected both by Sir John Leach and Lord Brougham;(w) and in a case where it was admitted that the effect of an agreement was to give an option to a lessee as to the duration of the term, but it was contended that this was not in the contemplation of the parties, Sir William Grant overruled the defence.(x)

§ 509. Again, as in cases of hardship the turning out of events in a way different from what the parties anticipated, will not furnish a ground of defence; so in regard to mistake, if persons choose to speculate upon

Eldon in Marquis Townshend v. Stangoom, 6 Ves. 333; Vouillon v. States, 25 L.J. Ch. 875, (M. R.)

(q) 6 Ves. 334.

(r) Mortimer v. Shorhall, 2 Dr. & W. 363, 374. In Pitcairn v. Ogbourne, 2 Ves. Sen. 375, 379, the evidence was considered sufficient to overcome the defendant's denial.

(s) Murray v. Parker, 19 Beav. 305.

(t) Aris. Nic. Eth. iii. 1. See also Pascal Lett. Provin. Let. 4.

(u) Marshall v. Collett, 1 Y. & C. Ex. 232, 238; Cockerell v. Cholmeley, 1 R. & My. 418.

(v) Pullen v. Ready, 2 Atk. 587; per Lord Alvanley in Gibbons v. Gaunt, 4 Ves. 849; Stockley v. Stockley, 1 V. & B. 23, 30; Mildmay v. Hungerford, 2 Vern. 243. See also Bilbie v. Lumley, 2 East, 469.

(w) Croome v. Lediard, 2 My. & K. 251. The decision is not put on the precise ground of ignorance of law furnishing no excuse; but the case probably may be considered on that ground.

(x) Price v. Dyer, 17 Ves. 356.

facts, and the view on which they acted proves to be a mistaken one, that circumstance will furnish no motive on which the court will act.(y)

§ 510. Where there is a mistake of both parties, but not about the very subject of the contract, it will not be a ground for rectifying the contract. Therefore where both parties were under a mistake as to the duration of a leasehold interest, so that the price was considerably less than if the actual extent of the interest had been known, and the vendors filed a bill asking for a reassignment of the extra term which the purchasers took under the assignment, the Vice-Chancellor Knight Bruce held that the lease was the substance sold and not a term of the supposed duration, and that the vendors ought to have known what was the condition of the property they proposed to sell, and accordingly dismissed the bill.(z)

§ 511. The court, on a clear principle, will not interfere for the rectification of a written contract where it was by the intention of the parties to it that the writing did not comprise all the terms of the actual agreement; for what is *done on purpose is evidently not done by [*226] mistake. Therefore where there was an agreement for an annuity, and the parties to it designedly omitted a proviso for redemption, thinking it would render the transaction usurious, the court refused to rectify the deed.(a) The parties "desired the court," said Lord Eldon,(b) "not to do what they intended, for the insertion of that proviso was directly contrary to their intention, but they desired to be put in the same situation as if they had been better informed, and consequently had a contrary intention."(c)

§ 512. Where the parol variation which the plaintiff or defendant seeks to set up is a subsequent agreement in parol between the parties to a written agreement, the case in nowise comes within the doctrine of mistake, and the parol variation is inadmissible under the Statute of Frauds, except in cases where the refusal to perform it might amount to fraud.(d)

§ 513. Therefore where A., by writing, agreed with B. to grant him a lease, to commence on the 21st of April, B. being merely the agent of C.; and subsequently A. and C. agreed by parol that the lease should commence from the 24th of June instead of the 21st of April, and be made to C. instead of to B., and C. and B. sought a specific performance of the written agreement as varied by the subsequent parol one, a plea of the Statute of Frauds was necessarily allowed.(e) And where there was an agreement in writing, and the defendant set up a subsequent parol agreement, by which the parties mutually abandoned the terms of the written agreement and then agreed upon new terms: Sir William

(y) See at law, *Harris v. Loyd*, 5 M. & W. 432.

(z) *Okill v. Whittaker*, 1 De G. & Sm. 83, affirmed 2 Phil. 338.

(a) *Lord Irnham v. Child*, 1 Bro. C. C. 92; *Lord Portmore v. Morris*, 2 Bro. C. C. 219; *Hare v. Shearwood*, 3 Bro. C. C. 168; S. C. 1 Ves. Jun. 241.

(b) *In Marquis Townshend v. Stangroom*, 6 Ves. 332.

(c) See also *Pitcairn v. Ogbourne*, 2 Ves. Sen. 375; cf. *Cripps v. Jee*, 4 Bro. C. C. 472.

(d) See per Sir Wm. Grant in *Price v. Dyer*, 17 Ves. 364.

(e) *Jordan v. Sawkins*, 3 Bro. C. C. 388; S. C. 1 Ves. Jun. 402.

Grant held that these new terms were merely meant to modify or add to the terms of the original agreement; *that therefore the parol [^{*227}] agreement could not be set up as a waiver of the first, and that the subsequent terms not having been in any way acted on, the second agreement formed no defence to the first, the execution of which he accordingly directed.(f)

§ 514. The question how far a plaintiff can enforce specific performance of a contract with a parol variation, or in other words, with a rectification of a mistake, is on the authorities in the English courts not perfectly clear: but the weight of authority appears distinctly to prevail in favour of the proposition that under no circumstances can a plaintiff sue for the specific performance of a contract with a parol variation.

§ 515. Before proceeding to consider the cases on this point, we may briefly advert to principles.

§ 516. With regard to a mistake of the plaintiff alone, it is at once obvious that to allow him to correct this mistake, and enforce the contract so corrected on the other party to it, would be a great injustice.

§ 517. With regard, however, to a mistake of both parties to a contract in the reduction of the contract into writing, there can be no objection in point of justice to the plaintiff's asking to have that mistake corrected, and to have the real contract carried into execution. This would be the result, if the plaintiff sued for specific performance of the written agreement, and then submitted to a parol variation set up and proved by the defendant. Again, there being an undoubted jurisdiction for the reform of contracts, and also a jurisdiction for the execution of them, there seems no reason why, when both these grounds of action are necessary to give the plaintiff his full rights, they may not be proceeded on in one and the same suit. For it seems that by two bills, one for reform and the other for specific performance, the plaintiff's end may now be attained.

[*228] *§ 518. The distinction between the mistake of the plaintiff only and the mistake of both parties in the reduction into writing of the contract should be borne in mind; for it may be submitted that some confusion exists in the cases in our courts from not making this discrimination; and further, that if this distinction be observed, it will appear unjust totally to exclude the plaintiff from the right of proving a parol variation in suits for specific performance.

§ 519. Whether this reasoning be incorrect or not, there are a series of cases which seem to establish in our courts the proposition, that the plaintiff can in no case be allowed to sue for the specific performance of an agreement with a parol variation: these may now be considered.

§ 520. In *Rich v. Jackson*(g) the plaintiff sought the execution of an agreement for a lease with a variation by the introduction of the words "clear of all taxes," and the witnesses proved the meaning of the parties to have been as the plaintiff alleged; but Lord Rosslyn(h) said, "I cannot find that this court has ever taken upon itself, in executing a written agreement by a specific performance, to add to it by any circum-

(f) *Price v. Dyer*, 17 Ves. 356.

(g) 4 Bro. C. C. 514; 6 Ves. 334, n.

(h) 6 Ves. 335, n.

stance that parol evidence could introduce;" and accordingly the parol evidence was rejected, and the court refused to execute the contract, except upon the terms of the written agreement, which the plaintiff declined, and accordingly had his bill dismissed.

§ 521. In *Woolam v. Hearn*(*i*) the point was fully considered by Sir William Grant. The plaintiff alleged an agreement with the defendant, by which the defendant was to grant to the plaintiff a lease of a certain house at £60 per annum : of this agreement a memorandum was drawn up and signed, but by mistake, or with some unfair view, £73, 10s. was inserted as the rent, instead of £60 : by her bill, the plaintiff sought specific performance of the *agreement rectified as to the amount [*229] of rent. The evidence of the plaintiff appeared to Sir William Grant to establish her position, but he rejected it and dismissed the bill, holding that though it would have been admissible for the plaintiff if she had been defendant, yet that it could not be used to procure a decree.

§ 522. The same doctrine was entertained by Lord Redesdale,(*k*) and has on more than one occasion been stated by Lord Cottenham, and also by Sir James Wigram.(*l*) "It is," said Lord Cottenham in one case,(*m*) "a familiar doctrine in this court, that, although to resist a specific performance, a defendant may show, by parol, that the written document does not represent the contract between the parties, yet a plaintiff cannot have a decree for a specific performance of a written contract with a variation, upon parol evidence."

§ 523. In the case of the *Attorney-General v. Sitwell*,(*n*) Mr. Baron Alderson expressed a strong opinion in accordance with the doctrine in question, that the court would not reform and then enforce an executory contract, except perhaps where the mistake was admitted by the answer, which might seem to take it out of the Statute of Frauds.

§ 524. This line of cases may be closed by the authority of Lord St. Leonards. In a case(*o*) which came before his lordship when chancellor of Ireland, there was a written agreement for a lease, and then a lease executed in consequence of it, and a bill was brought for the reform of the lease, not by the agreement, but by introducing a term into it by parol. His lordship stopped the argument for the plaintiff, considering that it was really against first principles to discuss the point, and said that the deed could *not be reformed by that which would have been inadmissible if the agreement were resting *in fieri*, and the bill had sought a specific performance of it. "It is said," observed his lordship,(*p*) "that if a mistake was proved, and that there was no written agreement, the parol evidence would be admissible. Perhaps it might, because there is no settled rule of law in the way, and as there is no written contract, the court must endeavour to ascertain, by the best evi-

(*i*) 7 Ves. 211; *Higginson v. Clowes*, 15 Ves. 516, 523; *Winch v. Winchester*, 1 V. & B. 375, 378.

(*k*) *Clinan v. Cooke*, 1 Sch. & Lef. 22, 38. (*l*) *In Manser v. Back*, 6 Ha. 447.

(*m*) *In Squire v. Campbell*, 1 My. & Cr. 480; *London and Birmingham Railway Company v. Winter*, Cr. & Ph. 57, 61. See also *Emmett v. Dewhurst*, 3 M'N. & G. 587.

(*n*) 1 Y. & C. Ex. 559.

(*p*) p. 233.

(*o*) *Davies v. Fitton*, 2 Dr. & W. 225.

dence it can get, what was the contract of the parties, and whether there was any mistake."

§ 525. It is perhaps not perfectly obvious why, if parol evidence would be admissible to correct a deed executed without any previous written agreement, it should yet be inadmissible to correct a written agreement itself; for the only principle applicable seems to be that writing excludes parol, and it might be thought that this would apply with more force to a solemn deed than to a mere preliminary agreement.

§ 526. It may perhaps also be inquired why, if the court presumes a previous agreement resting in parol, in the case of a deed, no such presumption is made in the case of a written agreement: why the written agreement may not, equally with the deed, be corrected by reference to such a previous parol agreement; and why the court does not, as much in the one case as in the other, ascertain what that agreement was by the best evidence it can get.

§ 527. The current of authorities, however strong, can yet scarcely be considered uniform in favour of the position that the plaintiff can never avail himself of a parol variation.

§ 528. There are dicta of Lord Hardwicke's which, notwithstanding the remarks upon them of Lord Redesdale(*q*) and of Sir William Grant,(*r*) [**231*] imply, it is submitted, a somewhat *different view of the question from that already stated. In *Walker v. Walker*,(*s*) John Walker, a brother of both the plaintiff and defendant, agreed with the plaintiff, by parol, that if the plaintiff would surrender his copyhold estate for the benefit of the defendant, he John Walker, would secure an annuity for the plaintiff's life, and another for that of his wife: upon this, John Walker surrendered his copyhold estate to the defendant, charged with these annuities; but the plaintiff did not, in accordance with his agreement with John Walker, surrender his copyhold estate to the defendant, whereupon the defendant refused to pay the annuities: the plaintiff brought his bill for their payment, and the defendant relied on the plaintiff's breach of the parol agreement with John Walker. Lord Hardwicke held that the plaintiff's equity was rebutted by the defendant's equity, and added,(*t*) "I am not at all clear whether, if the defendant had brought his cross bill to have this agreement established, the court would not have done it, upon considering this in the light of those cases, where one part of the agreement being performed by one side, it is but common justice it be carried into execution on the other, and the defendant would have had the benefit of it as an agreement." And in *Joynes v. Statham*,(*u*) Lord Hardwicke expressed his opinion that evidence of the omission, in an agreement for a lease, of the expression "clear of taxes," might have been given by the defendant, if he had been plaintiff seeking a specific performance, but his lordship considered it in the light of an explanation of an executory agreement, and not of a variation.

(*q*) In *Clinan v. Cooke*, 1 Sch. & Lef. 38. (*r*) In *Woolam v. Hearn*, 7 Ves. 219.

(*s*) 2 Atk. 98; S. C. 6 Ves. Jun. 335, n.

(*t*) 2 Atk. 100.

(*u*) 3 Atk. 388. See this and the preceding case observed on by Lord Redesdale in *Clinan v. Cooke*, 1 Sch. & Lef. 38, 39.

§ 529. There was a case before Lord Thurlow which, though it rests rather on the ground of fraud than mistake, *comes very near to admitting parol evidence on the part of the plaintiff to supply a [*_232] term in a written agreement. It was a bill brought by the original lessees of a term against the purchaser from them, for the specific performance of an agreement to indemnify the plaintiffs against all rents and covenants in the lease, and to execute a bond for securing such indemnity. The property had been sold by auction, and the conditions of sale did not stipulate for such an indemnity; but the agreement was proved by parol. Lord Thurlow held the evidence to be admissible, and laid it down that where an objection is taken before the party executes the agreement, and the other side promise to rectify it, it is to be considered a fraud on the party, if such promise is not kept: and his lordship, after an issue to satisfy himself of the facts, granted specific performance.(v)

§ 530. Lord Eldon seems to have been of opinion that parol evidence was admissible for the plaintiff. In the Marquis Townshend v. Stangroom,(w) the plaintiff in the original bill sought specific performance with a parol variation, and the defendant, by a cross bill, sought the performance of the written agreement as it stood. "I will not say," said his lordship,(x) "that upon the evidence without the answer I should not have had so much doubt, whether I ought not to rectify the agreement upon which Stangroom relies, as to take more time to consider whether the bill should be dismissed,"—language which seems to imply that, had the evidence been satisfactory, the agreement might have been rectified and performed.

§ 531. In a case(y) before Vice-Chancellor Knight Bruce, there was an assignment by deed of a farming lease and *stock for a [*_233] valuable consideration stated in the deed, and it was proved by parol that, over and above this consideration, there was an agreement to pay the plaintiff £40 a year for his life, and to find him during the same period a house worth £10 a year; the assignment having been carried into effect, the court granted specific performance of the parol agreement at the suit of the annuitant: the case was put on the ground of an additional consideration, which may be proved by parol when not inconsistent with the instrument.(z) It may be observed that, where such a consideration is executory and is alleged by the plaintiff and a specific performance of it obtained, the case seems to afford one instance in which a plaintiff may obtain specific performance of a contract with a parol variation.

§ 532. In the recent case of Martin v. Pycroft,(a) the plaintiff alleged

(v) *Pember v. Mathers*, 1 Bro. C. C. 52, per Sir Win. Grant in *Clarke v. Grant*, 14 Ves. 524. See also *Harrison v. Gardner*, 2 Mad. 198.

(w) 6 Ves. 328.

(x) p. 339.

(y) *Clifford v. Turrell*, 1 Y. & C. C. C. 138.

(z) *Rex v. Seammonden*, 3 T. R. 474.

(a) 2 De G. M. & G. 785. In the case of *Robinson v. Page*, 3 Russ. 114, the parol variations to which the plaintiff by his bill offered to submit were considered by the court not to affect the plaintiff's rights: the defendant was allowed to elect that they should be carried into effect or not, by reason of the plaintiff's offer, and not of any original right in the defendant.

a written agreement for a lease, and in addition a parol term,—namely, that he was to pay the defendant £200 for it, and prayed specific performance: Vice-Chancellor Parker refused it, on the ground that the plaintiff himself showed that a material term in the agreement had been omitted, and that the specific performance of such an agreement was inconsistent with the Statute of Frauds. This decision was overruled by the lords justices, who held that a written agreement, in the absence of fraud or mistake, binds at law and in equity, according to its terms, although verbally a term was agreed to which has not been inserted in the document, subject to this, that the defendant may call on the court to be neutral, unless the plaintiff will consent to the *omitted term, [*234] and that the present case came within that rule. The term was here, however, set up not by the defendant, but by the plaintiff, and the case seems therefore to show that the plaintiff may allege a parol variation, which, if set up by the defendant and submitted to by the plaintiff, might have been introduced into the agreement as specifically performed by the court. It thus seems to establish a very important limitation on the generality of the rule, that a plaintiff can never allege such a variation.

§ 533. In this state of the authorities, it may be interesting to state the opinion of American jurists. Though the doctrine that the plaintiff can never adduce parol evidence of a variation in suits for specific performance has been acted on by some of the courts of that country,(b) it has been combated by some of its most eminent jurists. "It is in effect," says Mr. Justice Story,(c) "a declaration that parol evidence shall be admissible to correct a writing as *against* a plaintiff, but not *in favour* of a plaintiff seeking specific performance. There is, therefore, no mutuality or equality in the operation of the doctrine. The ground is very clear, that a court of equity ought not to enforce a contract where there is a mistake, against the defendant insisting upon and establishing the mistake; for it would be inequitable and unconscientious. And if the mistake is vital to the contract, there is a like clear ground why equity should interfere at the instance of the party as plaintiff, and cancel it; and if the mistake is partial only, why, at his instance, it should reform it. In these cases the remedial justice is equal; and the parol evidence to establish it is equally open to both parties to use as proof. Why should not the party aggrieved by a mistake in an agreement have relief in all cases, where he is plaintiff, as well as where he is defendant? Why should not parol *evidence be equally admissible to establish [*235] mistake as the foundation of relief in each case? The rules of evidence ought certainly to work equally for the benefit of each party."

§ 534. In delivering judgment in the case of Keisselbrack v. Livingstone,(d) Mr. Chancellor Kent held the following language: "Why should not the party aggrieved by a mistake in the agreement have relief as well when he is plaintiff as when he is defendant? It cannot make any difference in the reasonableness and justice of the remedy, whether the mistake were to the prejudice of the one party or the other. If the

(b) 1 Story, Eq. Jur. § 161.

(d) 4 John. Ch. Rep. 148.

(c) Id. n.

court be a competent jurisdiction to correct such mistakes (and that is a point understood and settled,) the agreement, when corrected and made to speak the real sense of the parties, ought to be enforced, as well as any other agreement perfect in the first instance. It ought to have the same efficacy and be entitled to the same protection, when made accurate under the decree of the court as when made accurate by the act of the parties.”(e)

§ 535. It may further be observed, that there are cases though not strictly of specific performance, yet somewhat resembling them, where in the same suit the plaintiff has had an instrument rectified, and then obtained consequential relief: as, for example, where a bond and deposit of deeds were given to secure an advance, and the bond by mistake appeared to be usurious, the plaintiff proved the mistake, had the bond rectified, and was held entitled to the consequential relief to which an ordinary obligee and equitable mortgagee is entitled.(f) In another case,(g) a client entered into an agreement with his solicitor for the payment of a fixed sum of money in lieu of costs, *and the agreement contained mistakes as to the name and rights of the client, which, [*236] if construed strictly, would have excluded the solicitor from all rights under the agreement. In consequence of these mistakes, the solicitor by his bill alleged that he had no remedy at law, and he accordingly prayed that the agreement might be rectified, and an order made for payment of the sum of money under the agreement, as if at the time of its execution it had expressed the intention of the parties: the court accordingly made a decree directing the payment of the money.

*CHAPTER XV.

[*237]

OF THE INCAPACITY OF THE COURT TO PERFORM PART OF THE CONTRACT.

§ 536. THE court will not compel specific performance of a contract, unless it can execute the whole contract. It often therefore becomes important to inquire whether a contract is entire or divisible, or, in other words, what is the whole contract which must be executed: and it is proposed in the present chapter, first, to inquire what contracts are divisible; and secondly, to illustrate the general doctrine of the court above stated.

§ 537. It is obvious that the decision of the question whether a contract is entire or divisible, must depend on the particular nature of each contract, and the terms in which it is concluded: but some general rules may be gathered from the cases.

§ 538. A contract for the sale of property in one lot will generally be considered indivisible. Thus, in a case where two undivided seventh

(e) See per Lord Eldon in Cook v. Richards, 10 Ves. 441.

(f) Hodgkinson v. Wyatt, 9 Beav. 566. (g) Stedman v. Collett, 17 Beav. 608.

shares of land were sold in one lot, the court refused to enforce specific performance where a good title could be made to one seventh only :*(a)* and the purchaser of the entirety will, of course, not be compelled to take six undivided seventh parts of the estate.*(b)* And so in a recent case, where two persons were owners of an estate in undivided moieties, and an agreement was entered into by them with the plaintiff to lease the [*238] coals *under it, which agreement the plaintiff could not prove against one of the owners, the bill was dismissed against the other, as he had never contracted for one share alone ; if he had held himself out, and contracted as the owner of the whole, then the case would have been different.*(c)*

§ 539. But where properties are of two descriptions,—as, for example, a ship and the freight,—the fact that they are both included in one instrument, and dealt with for one entire sum, does not seem conclusively to render the contract indivisible.*(d)*

§ 540. After some vacillation in the older cases,*(e)* it is decided at law, that where property is sold in distinct lots, there is a separate contract for each lot,*(f)* each buyer having a complete right of action after he is declared the purchaser of each lot.*(g)* And in equity, the same is *prima facie* the case, so that in the absence of special circumstances, a vendor is entitled to compel the purchaser of two lots to complete his purchase of the one, though he may fail in making out a title to the other.*(h)* But where, from the nature of the contract, or the property that is the subject of it, or upon matters known to both parties, one of them can prove that the one transaction was dependent on the other, the two form one contract, although there may be no express statement to that effect.*(i)* And the parties by their subsequent dealing may convert two or more distinct contracts into an entire one, as by entering into one [*239] *agreement for the sale of the several subject-matters at one aggregate price :*(k)* thus, where A. purchased by auction three lots, of 100 shares each, and after the sale received the shares, paid the price, and received a bill of parcels describing the transaction as a sale of 300 shares : it was held, that as each lot was knocked down, there was a distinct contract for the sale of 100 shares, but that the subsequent dealings showed that the parties treated the transaction as one entire sale of 300 shares.*(l)*

§ 541. The mere fact of different prices being fixed for different parts of the subject-matter of the contract, will not necessarily make it divisible.

(a) Roffey v. Shaterross, 2 Bro. C. C. 118, n.; S. C. s. n. Roffey v. Shollcross, 4 Mad. 227.

(b) Dalby v. Pullen, 3 Sim. 29. *(c)* Price v. Griffith, 1 De G. M. & G. 80.

(d) Mestaer v. Gillespie, 11 Ves. 621, 629.

(e) See the cases reviewed by Lord Brougham in Casamajor v. Strode, 2 My. & K. 724. Chambers v. Griffiths, 1 Esp. 150, seems to be overruled.

(f) James v. Shore, 1 Stark. 426; Roots v. Lord Dormer, 4 B. & Ad. 77; per Coleridge, J., in Seaton v. Booth, 4 A. & E. 536.

(g) Emerson v. Heelis, 2 Taunt. 38, 45.

(h) Lewin v. Guest, 1 Russ. 325. See also Buckmaster v. Harrop, 7 Ves. 341; S. C. 13 Ves. 456.

(i) Casamajor v. Strode, 2 My. & K. 722; Poole v. Shergold, 2 Bro. C. C. 118; S. C. 1 Cox, 273; and at law, Gibson v. Spurrier, Peake, Add. C. 49.

(k) Dykes v. Blake, 4 Bing. N. C. 463. *(l)* Franklyu v. Lamond, 4 C. B. 637.

ble: so where a person went into a shop and bought various goods at distinct prices for each, the contract was still held to be single.(m) And where one price was fixed for the land, and another (a valuation price) for the timber, and the vendor could not show a title to all the timber by reason of the copyhold tenure of parts of the estate, which were not distinguishable from the freehold: the court held it, on the agreement, to constitute one contract, that consequently the vendor was only bound to make out the title according to the contract, and that the title to the land was the title to the timber;—and, as the conditions of sale provided for the copyhold tenure as to the lands, the contract was enforced as a whole.(n)

§ 542. In a case in which, by the same agreement, A. contracted to sell an estate to B., and B. contracted to sell another estate to A., the contracts in respect of the two estates were held to be independent of one another:(o) whilst in a case of cross contracts for the sale of goods, the Court of Exchequer held the contracts dependent.(p)

*§ 543. It is, as we have already seen, a principle of the court, [*240] that it will not compel specific performance, unless, it can at the time execute the whole contract on both sides, or at least such part of it as the court can ever be called on to perform. Therefore, where there was an agreement between two neighbouring landholders to change the course of a stream, and one of the terms of the agreement was that if any damage should accrue to the lands of the defendant from a dam which was agreed to be erected, the plaintiff would give an equivalent in land to the defendant, the quantity of land to be ascertained by arbitrators; this being a thing which the court could not do at once *in presenti*, and the court, holding that the parties entering into a covenant to do it would not be a specific performance of the contract, refused to interfere, as the whole agreement could not be carried into effect.(q) And where the owner of certain patents entered into an agreement with certain persons, who with himself were to form a company, to the promotion of which he was to give his services for two years, and to do his best to improve the invention for the benefit of the company, and on the refusal of these parties to go forward with the company, the patentee filed a bill for the specific performance of the agreement: the court held, on demurrer, that as it would have been impossible to enforce against the plaintiff the stipulations on his part, he could not sue for performance; and further, that the court could not carry the contract into effect by directing the parties to execute a deed, for the agreement was to do certain acts, and not to execute covenants to do them.(r)

§ 544. So wherever that which the plaintiff is to give as the consideration moving from him is something to be done at a future time, and

(m) *Baldey v. Parker*, 2 B. & C. 37.

(n) *Crosse v. Lawrence*, 9 H. 462; *Crosse v. Keene*, 9 H. 469.

(o) *Croome v. Lediard*, 2 My. & K. 251.

(p) *Atkinson v. Smith*, 14 M. & W. 695.

(q) *Gervais v. Edwards*, 2 Dr. & W. 80.

(r) *Stocker v. Wedderburn*, 3 K. & J. 393.

which the court cannot enforce, specific performance of the agreement will be refused.(s)

[*241] *§ 545. The principle that the court will not partially enforce contracts is illustrated by many other cases: Thus, where there was a partnership contract for an absolute term of years, leaving undefined the amount of capital and the manner in which it was to be provided, being a contract which in its entirety the court could not enforce, the court refused to enforce it in part, by refusing the representatives of a deceased partner a decree for the dissolution of the partnership and the sale of the partnership property.(t) And in a recent case,(u) the court refused to separate the parts of an award which were capable of specific performance from those which were not.

§ 546. Where the contract stipulates for future acts, but is silent as to any deed to be executed to secure their performance, the court, as we have seen, will not consider the execution of such a deed any performance of the stipulation; other cases have arisen, where the agreement contemplates some deed or obligation. Where there was a contract to execute works of such a nature that the court could not superintend their performance, and in the contract was a stipulation that the contractors should give a bond to secure the performance of the contract: the court refusing to decree performance of the works, refused also to decree the execution of the bond, as that would have been a piecemeal performance of the contract, and the stipulations as to the works were the substance of the agreement, and that as to the bond only incident to them.(v)

§ 547. But where the contract is to do a thing, and to execute a deed for that purpose, and this deed is not merely incidental, but, so to speak, covers the whole of the executory part of the contract, the court will, it seems, enforce *the contract by the execution of the deed, though [*242] the acts to be done be future, and to be done from time to time.(w)

§ 548. The cases on marriage contracts strongly illustrate the principle that the entire contract must be carried into effect. With regard to these, it has been urged that as the court interferes in behalf of those who are purchasers, or considered as such by the court, but declines to aid volunteers, so when the court specifically executes a settlement, its interference should be confined to limitations in favour of purchasers, and not extended to volunteers. The court, however, has applied the principle that the whole or no part of the contract shall be executed, to marriage contracts as well as to other agreements. "There is no instance," said Lord Hardwicke,(x) "of decreeing a partial performance of articles,—the court must decree all or none; and where some parts have appeared very unreasonable, the court have said we will not do

(s) *Per Wigram, V. C., in Waring v. Manchester, Sheffield and Lincolnshire Railway Company*, 7 H. 492.

(t) *Downs v. Collins*, 6 H. 418.

(u) *Nickels v. Hancock*, 7 De G. M. & G. 300. See also *Vansittart v. Vansittart*, 4 K. & J. 62.

(v) *South Wales Railway Company v. Wythes*, 1 K. & J. 186; S. C. 5 De G. M. & G. 880.

(w) *Granville v. Betts*, 19 L. J. Ch. 32. (x) *In Goring v. Nash*, 3 Atk. 190.

that, and therefore, as we must decree all or none, the bill has been dismissed." And in a recent case, (*y*) where a husband sued the heir of his wife, who was the settlor, on a covenant to settle lands, the specific performance was not restricted to his estate, but carried to a limitation to a niece of the wife, who was of course a collateral.

§ 549. The cases of exception, or rather of apparent exception, to the rule in question may now be considered.

§ 550. (1) From the cases of contracts which cannot be fully executed, must be discriminated those cases where, though under the agreement some future acts may remain to be done which the court could not enforce, yet at the time of the bill the plaintiff has acquired a right, perfect in itself in respect of past transactions.

§ 551. Thus where, in a contract for the execution of *rail-way works, previous to their completion, the contractors filed a [*243] bill against the railway company, alleging fraud in the engineer, in withholding certificates of work done, and asking amongst other things for an account of work done: it was held on demurrer, that though the works were not complete, and though the court might not be able specifically to perform such an agreement, the plaintiffs had a right, perfect in itself, of which they had been deprived by the alleged acts of the defendants, and that they were therefore entitled to some relief in equity. (*z*) And so it seems, that if by a partnership agreement it was stipulated that accounts should be made up half-yearly, and that one partner should have a salary proportionate to the profits to be so ascertained, he might from time to time file bills to have the accounts so taken according to agreement, though the other terms of the contract might be beyond the jurisdiction of the court. (*a*)

§ 552. To this principle we may probably refer the case of *Lytton v. The Great Northern Railway Company*, (*b*) where there being an agreement by the company to make and maintain a siding so long as it should be of convenience, the clause as to maintaining it was held no objection to a bill for the specific performance of the agreement to make it, the question of repairs being a matter for inquiry when a breach of that part of the contract should occur.

§ 553. (2) In the next place, it must be observed, that where the contract can be completely performed at the time, though there may be future acts dependent on it, the court will be able to grant specific performance: as, e. g., a contract for the immediate sale of timber to be cut down at a future time, and the purchase-money for it to be paid by instalments. (*c*) The cases already stated, where the court *will direct the execution of a covenant to do future acts, illustrate [*244] the same principle. (*d*)

§ 554. (3) It seems generally very questionable, how far the principle that the court will not perform part of a contract because it cannot per-

(*y*) *Davenport v. Bishopp*, 2 Y. & C. C. C. 451; S. C. 1 Phil. 698.

(*z*) *Waring v. Manchester, Sheffield, and Lincolnshire Railway Company*, 7 Ha. 482.

(*a*) *Per Wigram, V. C.*, in last case, 7 Ha. 496.

(*b*) 2 K. & J. 394.

(*c*) *Gervais v. Edwards*, 2 Dr. & W. 80.

(*d*) *Ante*, § 546.

form all, applies to cases where the impossibility of carrying out a part is due to the default of the defendant who sets up this defence. To permit it to prevail, would be counter to the maxim, that no man shall take advantage of his own wrong. In the case of the defendant's only possessing a part of the interest which he has stipulated to sell, the defect as to the other part is, as we have seen, no bar to specific performance at the suit of the purchaser.(e) In one case, there was an agreement between three railway companies having reference to a purchase and an amalgamation ; for the purchase no further parliamentary powers were needed, but for the amalgamation they were, and as regards one of the companies, they could not be obtained, because a majority of its shareholders were adverse to the scheme : in a suit relating to the purchase, the last-mentioned company set up as a defence the impossibility of carrying out the agreement as to the amalgamation ; but Lord Cottenham overruled the demurrer, and doubted whether the defendant company could say to the plaintiffs, that they should not have the benefit of such part of the contract as the defendants could perform, because they could not, without an act of parliament, perform the whole, and they declined applying to parliament to give them the necessary powers.(f)

§ 555. (4) It was formerly laid down that when the positive part of an agreement could not be performed by the court, it would not enforce the negative by injunction : so that, for example, where an actor had [*245] agreed to act at *a certain theatre, that being an agreement which the court could not enforce, it refused to restrain him by injunction from acting elsewhere :(g) and where there was a contract for hiring and exclusive service during seven years, and an agreement for partnership at the end of that time on such terms as should be mutually agreed on ; the agreement being one which the court could not perform as a whole, it refused to enforce by injunction the covenant for exclusive service.(h) Again, where the defendants had agreed to furnish the plaintiffs with the drawings for maps which the plaintiffs were exclusively to sell ; the court being unable to compel the defendants to furnish these drawings, refused an injunction to restrain the defendants from themselves selling the maps.(i)

§ 556. This principle, whilst held as law, was yet considered subject to several limitations or exceptions. Thus it was established, that where a partner agreed to exert himself for the benefit of the concern, and not to carry on the partnership trade except as a partner, the court would, if the partnership was subsisting, enjoin against a breach of the last stipulation though it certainly could not enforce the former ;(k) and it was further decided that the principle would not be carried so far as to prevent an injunction, because it might afterwards appear that there

(e) *Ante*, § 290.

(f) *Great Western Railway Company v. Birmingham and Oxford Junction Railway Company*, 2 Phil. 597, 605.

(g) *Kemble v. Kean*, 6 Sim. 333.

(h) *Kimberley v. Jennings*, 6 Sim. 340.

(i) *Baldwin v. Society for Diffusing Useful Knowledge*, 9 Sim. 393 ; *Clarke v. Price*, 2 J. Wils. 157.

(k) *Morris v. Coleman*, 18 Ves. 437 ; S. C. 6 Sim. 335 ; *Kemble v. Kean*, 6 Sim. 333.

was some part of the agreement which the court could not compel the defendant to perform.(l)

§ 557. But it is now clearly established by the recent case of Lumley v. Wagner,(m) that where there is an agreement in part positive and in part negative, and the positive part is such as the court might be unable to enforce *specifically, it may yet interfere in respect of the negative part by means of injunction. In that case, the defendant entered into an agreement with the plaintiff to sing at his theatre, and not to sing at any others; and Lord St. Leonards granted an injunction restraining the defendant from singing at any other theatre than the plaintiff's, though the specific performance of the positive part would have been certainly beyond his power. The principle was acted on in some earlier cases;(n) but in the case just cited all the authorities on the subject were quoted, and the principle above stated laid down by the lord chancellor after much discussion. In a subsequent case, Vice-Chancellor Wood considered that the principle established in the preceding case did not apply only where there were express negative provisions, and accordingly he enjoined an actor who had entered into an agreement to perform at Sadler's Wells Theatre (but without any stipulation that he would not perform elsewhere), from acting at any other place than the plaintiff's theatre on the nights on which he had so agreed to act.(o)

§ 558. In cases where the agreement on which an injunction is sought contains stipulations, some of which the court can, and others which it cannot enforce, and the latter are wholly on the plaintiff's part, no difficulty arises; because, though the court may be unable to enforce them directly, it does so indirectly, inasmuch as the moment the plaintiff fails in performing his part of the agreement, the injunction would be dissolved.(p)

§ 559. (5) Where an arrangement come to between two persons is intended to be of a complex character, partly *legal and partly honorary, the court will, if there be no other impediment, specifically perform the legal contract, leaving the honorary part of the arrangement to rest, as was intended, on the honour of the parties. So that, where this latter part is *malum prohibitum* and not *malum in se*, it will not obstruct the court in its execution of the other part of the arrangement which amounted to contract.(q)

§ 560. (6) When the agreement is in my manner alternative, so that the parts of it are mutually exclusive one of the other, and the plaintiff has a right to ask for the performance of one part, the court may treat this as independent of the other: thus, in an agreement to grant a lease with an option to the lessee to purchase, this option was held so far independent of the agreement for a lease, that a default on the part of the

(l) Whittaker v. Howe, 3 Beav. 383, 395.

(m) 1 De G. M. & G. 604.

(n) Dietrichsen v. Cabburn, 2 Ph. 52; Great Northern Railway Company v. Manchester, Sheffield and Lincolnshire Railway Company, 5 De G. & Sm. 138. See also Hills v. Croll, 1 De G. M. & G. 627, n.; S. C. 2 Phil. 60.

(o) Webster v. Dillon, 3 Jur. N. S. 432.

(p) Stocker v. Wedderburn, 3 K. & J. 393, 405.

(q) Carolan v. Brabazon, 3 Jon. & L. 200, 213.

plaintiff in insuring, which would have prevented his suing for a lease, did not prevent his suing on the option to purchase.(r)

§ 561. (7) In a recent case,(s) Sir J. Romilly appears to have expressed the opinion, that where a part of the contract which the court could not perform has been actually performed before suit, the incapacity of the court as to this part would furnish no defence as to the other part. In such a case there would seem, however, to have been no original mutuality.

[*248]

*CHAPTER XVI.

OF DEFECT IN THE SUBJECT-MATTER OF THE CONTRACT.

§ 562. ANOTHER ground on which the specific performance of a contract may be resisted is the existence of some essential defect in the subject-matter of it, or some variation from the description contained in the contract. This is of course not a question of title; the acceptance of the title will not prevent the defendant from setting up the defence that the title relates to a different subject-matter to that which he contracted for.(a) The cases in which this variation arises between the thing and some representation made in respect of it are considered under the head of misrepresentation :(b) the cases in which no such representation has been made I now propose briefly to consider.

§ 563. The material distinction to be considered is between defects which are patent and visible to every one and those which are latent; for just as at law a warranty, however general, will not be taken to include defects apparent at the time of the bargain, as no one could have been deceived by them; so, whilst latent defects are a ground for refusing specific performance, patent defects are not.(c)

§ 564. Accordingly where a man bought *a meadow, with a road round it and a way across it, which were not noticed in the description, Lord Rosslyn nevertheless enforced specific performance with costs :(d) and the circumstance that an estate described as inclosed in a ring-fence was not so, was held by Sir William Grant no defence to a suit for performance.(e)

§ 565. But where the objection taken by the purchaser, who was defendant, was the existence of certain water easements, and it was proved that the defendant had long lived in the neighbourhood, was well acquainted with the property, had in passing the road constantly seen some of the wells on the lower land supplied from the upper land, which

(r) *Green v. Low*, 22 Beav. 625.

(s) *Hope v. Hope*, 22 Beav. 351, but see S. C. before the L. J. J. 26 L. J. Ch. 417, 425.

(a) *Bentley v. Craven*, 17 Beav. 204.

(b) *Ante*, § 425 et seq.

(c) *Dyer v. Hargrave*, 10 Ves. 505; ante, § 446; cf. *Pothier*, *Tr. du Contrat de Vente*, part ii. ch. i. sec. 3, § 1.

(d) *Oldfield v. Round*, 5 Ves. 508, and see *Pope v. Garland*, 4 Y. & C. Ex. 404.

(e) *Dyer v. Hargrave*, 10 Ves. 505.

was the subject of the contract, and had on the morning of the sale been upon the land ; the Vice-Chancellor Knight Bruce expressed his opinion, but without giving the reasons, that no such degree of knowledge or notice had been proved as to preclude the purchaser from taking the objection.(f) In this case, it may be observed, the objection to the upper lands was the existence of certain rights granted with the lower lands to enter the upper lands, fetch water from a spring, and to cut and cleanse gutters for the conveyance of the water to the lower lands and similar easements. Now the wells, gutters, and all the other objects of sense might probably have existed without necessarily involving these easements ; and if so, it follows that the defect was in its nature latent and not really patent.

§ 566. With regard to the latency of defects, it is to be observed that the court will not demand a minute examination on the part of the purchaser, even where the vendor does not make any representation : to render a defect patent it must, it seems, be an obvious and unmistakable object of sense.

*§ 567. The defect need not be in the actual physical subject-matter of the contract, it may consist in the existence of [*250] some liability of which the other party is ignorant ; so that where the vendor of leaseshold property had before the sale received from his landlord a notice of re-entry in default of the premises being repaired, and did not communicate the existence of this notice to the purchaser, who however knew of the state of the premises, the contract was held void at the suit of the purchaser, who had been ejected ;(g) and the undisclosed fact that the property in question is liable to be taken under the powers of an act of parliament, is a valid ground for rescinding the contract at law.(h)

§ 568. The existence of a defect, unknown at the time of the contract both to the vendor and the purchaser, will not, it seems, be a bar to the enforcement of the contract,(i) unless probably where the defect is such as lies properly in the knowledge of the vendor.

§ 569. Where the variation between the thing and the description of it seems rather in the nature of an excess than of a defect, and so in favour of the purchaser, the vendor is nevertheless disabled from enforcing the contract on an unwilling purchaser. Thus, freehold land cannot be forced on a purchaser who bought it as copyhold. "It is unnecessary," said the master of the rolls, "for a man who has contracted to purchase one thing to explain why he refuses to accept another."(k)

§ 570. Where an uncertainty exists as to the subject-matter of the contract, but the description by which it was *sold is equally uncertain, there is of course no variation or defect. Therefore where pro- [*251]

(f) *Shackleton v. Sutcliffe*, 1 De G. & Sm. 609.

(g) *Stevens v. Adamson*, 2 Stark. 422. (h) *Ballard v. Way*, 1 M. & W. 520.

(i) Per Wigram, V.C., in *Lucas v. James*, 8 Hl. 418. See also *Parkinson v. Lee*, 2 East, 314.

(k) *Ayles v. Cox*, 16 Beav. 23. See the observations of Lord St. Leonards in this case, *Vend. & Pur.* 251 ; cf. also *Stanton v. Tattersall*, 1 Sm. & G. 529. Copy-holds cannot of course be forced on a purchaser of freeholds, *Hick v. Phillips*, *Prec.* in Ch. 575.

perty was sold by a general description as being part freehold and part leasehold, and the exact boundary between the freehold and leasehold part of the estate could not be ascertained, this circumstance furnished no defence to a suit for specific performance.(l)

§ 571. A purchaser may of course contract for the purchase of a thing with all faults, and he then takes on himself the knowledge of the title and of the qualities of the subject. The cases on the effect of this clause in a contract seem to show,—first, that such a contract is binding, however many may be the defects in the subject, and whether they be latent or patent, and whether discoverable by the purchaser or not :(m) secondly, that it will not protect the vendor where he takes positive means to conceal the defects,(n) as where a vessel was moved off her ways where she lay dry, into the water in order to conceal her worm-eaten bottom and broken keel :(o) and thirdly, that it will not protect the vendor when he makes a misrepresentation, and that misrepresentation is embodied in the contract,(p) or is both false and fraudulent.(q) The court refuses to direct any inquiry as to title, where the sale is with all faults, and the vendor only sells such interest as he has.(r)

§ 572. The effect on the specific performance of the contract of a defect in the thing sold, or a variation from the description, is twofold, according to its magnitude. If, in the view of the court, it be unessential, [**252] the contract may *yet be performed, but with compensation ; if it be essential, it confers on the party injured the right of rescinding the contract and defeating its performance.(s) The distinction between these two classes of cases will be considered in the chapter on compensation.

[*253]

*CHAPTER XVII.

OF THE WANT OF A GOOD TITLE.

§ 573. WHERE the vendor of land sues the purchaser for a specific performance of the contract, the defendant is entitled to have the plaintiff's bill dismissed, if it appear that the plaintiff cannot make out to the land a title free from reasonable doubt. The defendant may have the bill thus dismissed at the hearing, provided the defect in title has been prominently put forward in the pleadings, and the court can then decide

(l) *Monro v. Taylor*, 3 M⁴N. & G. 713. As to conditions respecting such a mingling of tenures, see also *Crosse v. Laurence*, 9 H^a. 462 ; *Crosse v. Keene*, id. 469.

(m) *Baglehole v. Walters*, 3 Camp. 154; *Pickering v. Dowson*, 4 Taunt. 779, overruling Lord Kenyon's decision in *Mellish v. Motteux, Peake*, 115, that the stipulation in question only applies to faults which the purchaser can discover or the vendor is ignorant of.

(n) *Baglehole v. Walters*, 3 Camp. 154.

(o) *Schneider v. Heath*, 3 Camp. 506.

(p) S. C.

(q) *Early v. Garrett*, 9 B. & C. 928; *Springwell v. Allen*, 2 East, 448, n.

(r) See post, § 830.

(s) *Stanton v. Tattersall*, 1 Sm. & G. 529.

the question.(a) But the question more usually arises after the reference of title has been made.

§ 574. The old practice of the court in all cases of dispute as to the title of the estate sold, was to decide either for or against the validity of the title, and either to compel the purchaser to take it as good, or to dismiss the bill on the score of its being bad.(b) But the case of Marlow v. Smith,(c) before Sir Joseph Jekyll, followed by Shapland v. Smith,(d) before Lord Thurlow, established the present practice of allowing a class of titles which, without affirming them to be bad, the court considers so doubtful as that it will not compel a purchaser to take them.(e)

*§ 575. Lord Eldon, though feeling himself bound to adhere [*_254] to this as an established rule, on more than one occasion expressed his dissent from it on principle, and bewailed the great mischiefs which had resulted from it.(f) The rule has also been objected to as being logically absurd, as well as practically injurious; for every title, it is said, is good or bad, and if so, the court ought to know nothing of a doubtful title.

§ 576. Notwithstanding such doubts, it may be submitted that, having regard to the nature of a suit for specific performance, the rule in question is necessary in point of practical justice and correct in reasoning. It must be remembered that the decree of the court in such a suit is a judgment *in personam* and not *in rem*; that it binds only those who are parties to the suit, and those claiming through them, and in no way decides the question in issue as against the rest of the world: and that doubts on the title of an estate are often questions liable to be discussed between the owner of the estate and some third person not before the court, and therefore not bound by its decision. If therefore there be any reasonable chance that some third person may raise a question against the owner of the estate after the completion of the contract, the court considers this to be a circumstance which renders the bargain a hard one for the purchaser, and one which in the exercise of its discretion it will not compel him to execute. Though every title must in itself be either good or bad, there must be many titles which the court cannot pronounce with certainty to belong to either of these categories in the absence of the parties interested in supporting both alternatives, and without having heard the evidence they might have to produce, and the arguments *they might be able to urge: and it is in the absence [*_255] of these parties that the question is generally agitated in suits for specific performance. The court, when fully informed, must know whether a title be good or bad; when partially informed, it often may

(a) Lucas v. James, 7 H. 418, 425.

(b) See 1 Bro. C. C. 76, n.

(c) 2 P. Wms. 198.

(d) 1 Bro. C. C. 75. Lord Eldon was in the habit of treating this as the first case in which the present rule had prevailed: but in Sloper v. Fish, 2 V. & B. 149, Sir Wm. Grant referred to the earlier case, and stated that the rule in question had been repeatedly acted on by Lord Hardwicke.

(e) See also Cooper v. Denne, 4 Bro. C. C. 80; S. C. 1 Ves. Jun. 565; Sheffield v. Lord Mulgrave, 2 Ves. Jun. 526; Roake v. Kidd, 5 Ves. 647; Willcox v. Bellairs, T. & R. 491.

(f) In Vancouver v. Bliss, 11 Ves. 465, and in Jervoise v. Duke of Northumberland, 1 J. & W. 568.

and ought to doubt. If there be any want of strict reasoning about the principles on which the court acts in this matter, it is perhaps in deciding any title to be good or bad, rather than in declaring some to be doubtful. But it is with practical certainty and practical doubts that the court concerns itself.(g)

§ 577. It is by no means easy to express what amount of doubt upon a point there must be to induce the court to refuse specific performance. One mode of measuring it has been by applying the question, whether it is such a title as that the judge himself would lend his own money upon it. The court "has almost gone the length," said Lord Eldon, "of saying that unless it is so confident that if it had £95,000 to lay out on such an occasion, it would not hesitate to trust its own money on the title, it would not compel a purchaser to take it."(h)

§ 578. In another case,(i) Lord Eldon put the question for the court as being, "whether the doubt is so reasonable and fair, that the property is left in his (the purchaser's) hands not marketable :" but a marketable title being "one which, so far as its antecedents are concerned, may at all times and under all circumstances be forced on an unwilling purchaser,"(k) the observation seems not *much to assist us in measuring how great the doubt must be.

§ 579. Though the court may entertain an opinion in favour of the title, yet if it be satisfied that that opinion may fairly and reasonably be questioned by other competent persons, it will refuse specific performance. Thus, in a case(l) before Sir John Leech, he expressed the strong inclination of his opinion to be in favour of the title, and yet refused the relief sought by the plaintiff; and in the recent case of Pyrke v. Waddingham,(m) in which the Vice-Chancellor Turner discussed the subject now before us, he expressed an opinion in favour of the title, but nevertheless dismissed the vendor's bill with costs. Still less, of course, will the court force a title on a purchaser in opposition to the decision of another court, though it may think that decision to be wrong.(n)

§ 580. Further, the court will never compel a purchaser to take a title where the point on which it depends is too doubtful to be settled without litigation, or where the purchase would expose him to the hazard of such proceedings. The court will not, to use the favourite expression, compel him to buy a lawsuit.(o)

(g) How far the practical ill effects of this rule might be lessened by giving the court a power of making declaratory decrees, is a question worthy of the attention of law reformers.

(h) In Jervoise v. Duke of Northumberland, 1 J. & W. 569. See also Sheffield v. Lord Mulgrave, 2 Ves. Jun. 526; per Turner, V. C., in Pyrke v. Waddingham, 10 H. 9.

(i) In Lord Braybroke v. Inskip, 8 Ves. 428.

(k) Per Turner, V. C., in Pyrke v. Waddingham, 10 H. 8.

(l) Price v. Strange, 6 Mad. 159, 164.

(m) 10 H. 1. In the case of Wrigley v. Sykes, 21 Beav. 337, the master of the rolls considered that if the court is of opinion that a title is clear, it will enforce specific performance, and will not speculate whether any other court would come to an opposite conclusion. But Lord St. Leonards has expressed his doubt upon this case, Vend. 322.

(n) Rose v. Calland, 5 Ves. 186.

(o) Price v. Strange, 6 Mad. 159, 165; Sharp v. Adcock, 4 Russ. 374.

§ 581. But though the court is thus jealous in protecting purchasers from risk, it is not the suggestion of a mere theoretical doubt that will discharge them from their contracts. The court, to use Lord Hardwicke's language in one case,(p) "must govern itself by a moral certainty, for it is impossible in the nature of things there should be a *mathematically certainty of a good title," or as it was expressed by [*257] Baron Alderson, there must, to render the title bad for this purpose, "be a reasonable, decent probability of litigation."(q) Accordingly, in the case before Lord Hardwicke, his lordship enforced specific performance, although there was a reservation of mines, because the court was satisfied that there was no subject-matter for the reservation to act upon, or that all legal right to exercise it had ceased.(r) And in a recent case,(s) the master of the rolls forced on an unwilling purchaser a title depending on the validity of a purchase by a solicitor from his client, on proof of the validity of the transaction, though given in the absence of the client, who, it was urged, might possess other evidence and ultimately set aside the sale.

§ 582. Accordingly, the court will compel specific performance where the title depends on a presumption, provided it be such, that if the question were before a jury, it would be the duty of the judge to give a clear direction in favour of the fact; but not where the evidence would be left to the consideration of the jury.(t) So where the recital of deeds raised the presumption that they contained nothing adverse to the title, the mere loss of the deed, where the title was fortified by sixty years' undisputed possession, was held not to create a reasonable doubt :(u) and so again, where the validity of a title depended on no execution having been taken out under certain judgments, between the 27th September, 1769, and the 23rd May, 1770, and nothing was shown to have been done which could be referred to such an execution, the court considered the title *good.(v) To this head may perhaps be referred the fact, that the court will compel specific performance of a title depending on [*258] the invalidity of a voluntary conveyance as against a purchaser for valuable consideration without notice,(w) the court, as it seems, acting on the presumption of the conveyance not having been rendered valid by subsequent dealings.

§ 583. We have already seen that where the evidence would be left to a jury to draw their own conclusion from it, if the case were before such a tribunal, there the presumption is not held to be sufficient to justify the court in forcing the title on a purchaser. To this principle we may probably refer many of those cases where a doubt as to a fact has prevailed: as where the title depended upon proof that there was

(p) In Lyddal v. Weston, 2 Atk. 20.

(q) In Cattell v. Corrall, 4 Y. & C. Ex. 237.

(r) See as to this case per Sir W. Grant in Seaman v. Vawdrey, 16 Ves. 393; Martin v. Cotter, 3 Jon. & L. 496.

(s) Spencer v. Topham, 22 Beav. 573.

(t) Emery v. Grocock, 6 Mad. 54; Barnwell v. Harris, 1 Taunt. 430.

(u) Prosser v. Watts, 6 Mad. 59; Magennis v. Fallon, 2 Moll. 561.

(v) Causton v. Macklew, 2 Sim. 242.

(w) Butterfield v. Heath, 15 Beav. 408; Buckle v. Mitchell, 18 Ves. 100.

no creditor who could take advantage of an act of bankruptcy committed by the vendor ;(x) or where the title depended on the absence of notice of an incumbrance, of which absence the vendor produced some evidence,(y) or upon the presumption arising from mere possession.(z)

§ 584. The court will not allow a voluntary settlor to force on a purchaser a title depending on the invalidity of the settlement.(a) "One difficulty in the way of assisting him," said Lord Eldon,(b) "is, that he has no equity to defeat the act which he has done himself: but another consideration which has weighed in such cases is, that if you compel a purchaser to take an estate at the instance of such a man, you cannot be quite sure that there may not have been some intermediate acts, which by matter *ex post facto*, may have made the settlement good which in its origin was not good."

*§ 585. A question of no little nicety arises, where, though [*259] there be no proof of fraud, the circumstances of the title may admit of a suspicion of it, and where the *bona* or *mala fides* of the transaction, and its consequent validity, depend on extrinsic circumstances. In Hartley v. Smith,(c) the title depended on a deed of grant of chattels, containing a stipulation for the grantor's continuing conditionally in possession; and Sir John Leach, without deciding whether such a deed was in itself fraudulent and an act of bankruptcy, declined to force the title on the purchaser, on the ground that its validity depended on its being made upon good consideration and *bona fide*, and that these were circumstances, the existence of which the purchaser had no adequate means of ascertaining. "My opinion therefore is," said the vice-chancellor, "that a court of equity ought not to compel this purchaser to accept this title; because assuming the deed not to be fraudulent *ex facie*, it still may be avoided by circumstances extrinsic, which it is neither in the power of the purchasers or of this court to reach."(d)

§ 586. This dictum of Sir John Leach seems to allow no room to the presumption of *bona fides*, and to make the possibility of fraud in extrinsic facts a sufficient objection to the title: accordingly, it has not been accepted in all its generality. It "must not," said Baron Alderson, of this dictum, "be pushed to the farthest extent which the words will possibly bear:"(e) and accordingly, that judge held as good a title under a deed which extrinsic evidence might have shown to be invalid, as comprising all the property of the grantor, or as made to give a fraudulent preference to some creditors over others, or as made in contemplation of [*260] bankruptcy, because there was no ground apparent *for making any of these objections to it.(f) In another case,(g) the vendor claimed under an appointment made by a husband and wife to their eldest daughter, under a settlement which gave them successive life estates, with remainder to their children as they should appoint, and in

(x) Lowes v. Lush, 14 Ves. 547. (y) Freer v. Hesse, 4 De G. M. & G. 495.

(z) Eytom v. Dicken, 4 Pri. 303.

(a) Smith v. Garland, 2 Mer. 123; Burke v. Dawson, Sug. Vend. 592.

(b) In Johnson v. Legard, T. & R. 294. (c) Buck, Bankr. C. 368.

(d) p. 380. See also Boswell v. Mendham, 6 Mad. 373.

(e) 4 Y. & C. Ex. 236.

(f) Cattell v. Corral, 4 Y. & C. Ex. 228. (g) Green v. Pulsford, 2 Beav. 71.

default of appointment, between such children; and the parents had encumbered their life interests, and shortly after the appointment they and their daughter executed a mortgage: these were circumstances which might create in every one's mind a suspicion that the appointment was a fraud on the settlement, and that was strengthened by a notice from a younger son to the purchaser not to complete, and that the appointment was such a fraud: but inasmuch as the notice alleged no facts, and gave no information not apparent on the abstract, and was not followed up by any proceedings, the court considered that the title was not open to any sufficient doubt, and forced it on the purchaser. And in an earlier case, where there were somewhat similar grounds for suspecting the *bona fides* of an appointment, Lord Eldon pursued the same course, and enforced specific performance.(h)

§ 587. Again, a purchaser is not entitled in the absence of circumstances of suspicion to refuse a title made under a will, because the will has not been proved against the heir or he does not join :(i) so that where during a litigation of thirteen years, no question had been raised impeaching the validity of the will, and a person who had claimed under another will had withdrawn from all contention against that first mentioned, Vice-Chancellor Wood compelled the purchaser to take a title under the will.(k)

*§ 588. But on the other hand, the court refused to compel [*261] specific performance in respect of a title, which in absence of special circumstances was irregular, such circumstances not appearing.(l)

§ 589. The doubt which may prevent the court compelling the purchaser to accept a title may be a doubt either of law or of fact: and, as to law, it may be connected with the general law of the realm,(m) or with the construction of particular instruments;(n) and, as to fact, it may be in reference to facts appearing on the title, or to facts extrinsic to it.(o) Again, it may be about a matter of fact which admits of proof, but has not been satisfactorily proved,(p) or about such a matter as from its nature admits of no satisfactory proof, as the negative proposition that there was no creditor of the vendor capable of taking advantage of an act of bankruptcy.(q)

§ 590. The grounds of defence hitherto considered in these pages are for the most part such as are connected with the contract itself, or the circumstances under which it was entered into: those now to be considered relate principally to matters *ex post facto* and subsequent to the contract.

(h) M^cQueen v. Farquhar, 11 Ves. 467. See also Grove v. Bastard, 2 Phil. 619; S. C. 1 De G. M. & G. 69.

(i) Colton v. Wilson, 3 P. Wms. 190; per Lord Eldon in Morrison v. Arnold, 19 Ves. 670; Weddall v. Nixon, 17 Beav. 160.

(k) McCulloch v. Gregory, 3 K. & J. 12. (l) Blacklow v. Laws, 2 Ha. 40.

(m) Sloper v. Fish, 2 V. & B. 145; Blosse v. Lord Clanmorris, 3 Bl. 62.

(n) Lincoln v. Arcedeckne, 1 Coll. C. C. 38; Bristow v. Wood, 1 Coll. C. C. 480; per Turner, V. C., in Pyrke v. Waddingham, 10 Ha. 9.

(o) Id.

(p) Smith v. Death, 5 Mad. 371.

(q) Lowes v. Lush, 14 Ves. 547.

[*262]

*CHAPTER XVIII.

OF FAILURE OF THE CONSIDERATION.

§ 591. It will be necessary to inquire under what circumstances, events which either determine the existence of the subject-matter of the contract or essentially affect it, will furnish a defence in specific performance. Events affecting the subject-matter, but not essentially, may give rise to a claim for compensation, but will not discharge the contract.

§ 592. Events happening before the conclusion of a contract, and either determining the existence of the subject-matter or materially affecting it, may avoid a contract which, but for such events, would have been complete and binding. The operation of such events is, properly speaking, not to determine the contract, but to prevent the contract ever arising.

§ 593. In one case, (a) the agreement was for the sale of an estate in fee in remainder on an estate tail; a conveyance had been executed and a bond given for payment of the purchase-money, when it was discovered, for the first time, that at the time of the sale no such remainder existed, the tenant in tail having previously suffered a recovery: the court rescinded the contract, and ordered the bond to be delivered up and repayment to be made of all interest which had been paid on it.

§ 594. A contract relating to a chattel implies, at law, *the existence of the chattel, and its existence in the form or of the description specified in the contract, and consequently an event destroying the chattel before the contract is concluded puts an end to it. Therefore, where an agreement for the sale of a life annuity was concluded in England on the 28th of February, and the annuitant died in New South Wales on the 6th of the same month, there was held to be no contract: (b) and where a floating cargo was sold, and it subsequently appeared that at the time of the sale the captain had sold the cargo abroad, in consequence of the damage it had sustained at sea, the exchequer chamber and the house of lords held the contract to be incapable of being enforced. (c) But as no warranty is implied at law as to condition, the sale of a ship at sea, which at the time happened to have been stranded, was binding, for the subject of the contract still continued a ship. (d)

§ 595. The impossibility of performing a contract of which the subject-matter is extinct would of course prevent the interference of equity in these cases, if on other grounds it could give relief. (e)

§ 596. But a person may so contract as to preclude himself from raising any question as to the existence or determination of the subject-matter at the time of the contract. (f)

(a) Hitchcock v. Giddings, 4 Pri. 135.

(b) Strickland v. Turner, 7 Exch. 208.

(c) Couturier v. Hastie, 8 Ex. 40, reversed in Cam. Seac. 9 Ex. 102: the reversal affirmed 5 H. L. Lords, 673.

(d) Barr v. Gibson, 3 M. & W. 390.

(e) See post, § 658.

(f) Hanks v. Pulling, 25 L. J. Q. B. 375. See post, § 830.

§ 597. The question of the time at which the contract has become complete arises particularly in cases of sales by the court, because until the report had been confirmed absolute, or according to the new practice, until eight days after the certificate of the purchase has been signed by the judge in chambers, the biddings may be reopened. In these cases, the question is whether the contract is to be *treated as concluded by the sale before the master, subject only to being defeated by the opening of the biddings, in which case the confirmation will relate back to the day of sale, and that day will divide events prior and events subsequent to the contract; or, on the other hand, whether the contract is to be considered concluded only when it becomes absolute and indefeasible by the confirmation. In the case of *Vesey v. Elwood*,^(g) Lord St. Leonards decided on the former of these views, that the sale transfers the property, subject only to the risk of its being opened. This was the view of Lord Eldon also, in *Anson v. Towgood*,^(h) though it seems at variance with the previous cases⁽ⁱ⁾ before him. The other view is supported by the statement of Lord Langdale;—“by the established rule of the court, the purchaser is to be considered as the owner of the estate from the date of the order confirming the report;”^(k) but as the circumstance which in this case gave rise to the question was not only after the sale but after the confirmation also, the case is probably not of the same weight on the point now under discussion, as if the circumstances had been after sale but before confirmation.

§ 598. With regard to events happening in the case of private contracts after their being signed, it has been laid down that the question on whom the advantage or loss resulting from them would fall, and whether, therefore, the court would enforce specific performance without reference to them,—or whether, on the other hand, they might determine the contract,—is to be decided by whether or not the title had then been actually accepted.^(l) But the more *correct doctrine appears to be that the contract is binding from signature if there be a good title, though that may not be shown till afterwards. “It is,” said Sir Thomas Plumer,^(m) “the established doctrine of equity, that if a contract to purchase is to be completed at a given period, and the title is *finally made out*, the parties continuing in treaty, and the purchaser not by any acts released from his bargain, the estate is considered as belonging to the purchaser from the date of the contract, and the money from that time as belonging to the vendor.”

§ 599. Where the contract is in its inception conditional, the transfer of property from the vendor to the purchaser takes place not on the conclusion of the contract, but on its becoming absolute by the perform-

(g) 3 Dr. & W. 74.

(h) 1 J. & W. 637.

(i) *Ex parte Minor*, 11 Ves. 559, (which may perhaps be supported by the general power of the court in dealing with such contracts;) *Twigg v. Fifield*, 13 Ves. 517.

(k) *Robertson v. Skelton*, 12 Beav. 260, 265; cf. *Paramore v. Greenslade*, 1 Sm. & G. 541.

(l) *Wyll v. Bishop of Exeter*, 1 Pri. 292, 295, n.; and see *Paine v. Meller*, 6 Ves. 349.

(m) *In Harford v. Purrier*, 1 Mad. 538.

ance of the condition, and until that event the property sold remains at the risk of the vendor. This is well illustrated by a case(*n*) which was decided by the judicial committee of the privy council, on appeal from the Court of Chancery in Canada. An agreement was entered into for a lease for five years, from the 1st of April, 1840, the landlord undertaking to erect by that time a new warehouse on part of the ground to be demised, and to put the old warehouse in repair, the amount of rent to be determined with reference to the amount expended on the buildings. The new building was not completed, nor the old warehouse repaired, on the 1st of April, but no objection was made by the intended lessees, who then continued to occupy part of the premises under a former agreement. Shortly afterwards, the whole premises were destroyed by fire. The landlord brought a bill for specific performance of the agreement, and for the defendants to rebuild the premises and accept a lease. It was held, in the first place, that if time were of the essence, it had been waived by the defendants, *but that this did not waive [²⁶⁶] the obligation on the lessor as to building, and that the defendants were not bound to accept a lease till that was performed; and, in the second place, that, treating the contract to take a lease as a contract to purchase, the warehouse was never purchased by the lessees until it was completed by the lessor; and, consequently, that until that was done it was not the property of the lessees, nor at their risk.

§ 600. When the contract has been completely made, the thing sold is at the risk of the purchaser, who must bear all subsequent losses, and is entitled to all subsequent gains :(*o*) such events, therefore, cannot determine the contract.(*p*)

§ 601. Formerly this principle does not appear to have been as clearly recognized as it is at present: thus, in case of a great subsequent advantage, Lord Hardwicke seems to have doubted how far the court would decree specific performance on the original terms.(*q*) And where A. agreed to sell his estate for an annuity during his life: the time appointed for conveyance was the 31st of October, but the annuity was to commence from the 5th of April previous, and to be paid half-yearly: the half-year's payment, due on the 5th of October, was not paid or tendered, and on the 12th of November, A. died from an accident; Lord Bathurst and the house of lords dismissed a bill for specific performance.(*r*) Lord St. Leonards(*s*) attributes this decision to the neglect to make or tender the payment; but it does not seem clear that the case was not considered by the judges who decided it as one of inadequate consideration, and treated as a case of hardship.

§ 602. The principle as now established is illustrated by *numerous cases. Thus, where money was left to be laid out in land to be settled to the use of A. in tail, remainder to B. in fee, and A. and B. agreed to divide the money, and before the agreement had

(*n*) Counter v. Macpherson, 5 Moo. P. C. C. 83.

(*o*) Instit. l. iii. tit. 24, sec. 3; Pothier, Tr. du Contrat de Vente, part iv.

(*p*) Per Lord Manners in Revell v. Hussey, 2 Ball & B. 287.

(*q*) Davy v. Barber, 2 Atky. 489. See also Stent v. Bailis, 2 P. Wms. 217.

(*r*) Pope v. Roots, 1 Bro. P. C. 370.

(*s*) Vend. 244.

been carried into execution A. died without issue, the agreement was nevertheless specifically performed.^(t) So an agreement to sell for an annuity will not be avoided by the death of the annuitant, even before any payment.^(u) So where, subsequently to the contract, houses were burnt down, the loss fell on the purchaser.^(v) And, again, where a trader agreed to take two persons into partnership for a period of eighteen years, in consideration of a sum to be paid by instalments, and before they were all paid he became a bankrupt, the assignees were held entitled to the remaining instalments.^(w)

§ 603. Where an agreement, capable of being specifically executed at the time of the filing of the bill, has by lapse of time between that and the hearing become incapable of execution in the ordinary way, so as to confer future benefits, the question arises, what course ought to be pursued. This question came before Sir Thomas Plumer in *Nesbitt v. Meyer*,^(x) where a bill was filed before the term expired for a specific performance of an agreement to accept a lease, but, without fault on either side, the term expired before the hearing. The case was decided upon another point, but the master of the rolls evidently inclined to the opinion, that the court would not decree the execution of a formal lease after the expiration of the term. In accordance with this view, Lord Cranworth, approving the judgment of Vice Chancellor Wood, has expressed [*268] *the opinion that it would require very special circumstances indeed to induce the court to decree specific performance of a lease after the expiration of the term.^(y) "What the court," said his lordship,^(z) really would be decreeing in such case would not be the specific performance for an agreement for a lease, but merely that the lessee should make himself a specialty debtor in respect of past benefits received." It is, however, to be remarked, that the circumstances of the case before Sir Thomas Plumer and before his lordship were different, inasmuch as in the former the delay seems entirely due to the court; whereas in the latter no steps were taken until just before the expiration of the term, so that it was impossible for the plaintiff to obtain a decree until the term was at an end.

§ 604. On the other hand, the opinion of Baron Alderson was somewhat at variance with the doctrine above stated. "The moment the bill is filed," said his lordship,^(a) "the rights of the parties remain fixed, or ought so to do. I cannot accede to the doctrine in *Nesbitt v. Meyer*. How can the constitution of the court alter the rights of the parties?" The decision in the case in the exchequer seems, however, reconcilable with those before stated; for the prayer of the bill was for the specific

(t) *Carter v. Carter, Forrest*, 271.

(u) *Mortimer v. Capper*, 1 Bro. C. C. 156; *Jackson v. Lever*, 3 Bro. C. C. 605.

(v) *Paine v. Meller*, 6 Ves. 349. In *Cass v. Ruddle*, 2 Vern. 280, the earthquake which destroyed the houses appears to have taken place after the contract had been carried into effect. See Rathly's n. on the case, and 1 Bro. C. C. 156, n.

(w) *Akhurst v. Jackson*, 1 Sw. 85. See also per Lord Eldon in *Coles v. Trecothick*, 9 Ves. 246.

(x) 1 Sw. 223.

(y) *Walters v. Northern Coal Mining Company*, 5 De G. M. & G. 629.

(z) p. 639. See also *Hoyle v. Livesey*, 1 Mer. 381.

(a) *Wilkinson v. Torkington*, 2 Y. & C. Ex. 726, 728.

performance of an agreement for a lease, and for an account of arrears of rent on the footing of the agreement, and it was held that although by the expiration of the term before the hearing the specific performance could not be granted, yet that the plaintiff was entitled to a decree for an account.

§ 605. And similarly, in a previous case(*b*) before Sir John Leach, he held that a bill might be maintained by a purchaser for the specific performance of an agreement for a life annuity, although the annuitant had died not only *before the hearing, but before the bill was filed, [*269] where there were arrears of the annuity between the time of the purchase and the death of the annuitant, to which the purchaser had an equitable title under the contract: but his honor said that it might be a question whether such a bill could be maintained if the death of the annuitant were to happen so that the purchaser took no benefit under his contract, as might happen where his title was to commence at a future time.

§ 606. These cases, it must be confessed, leave the exact state of the law on this point somewhat difficult to state. It is, however, submitted that the rule to be collected from them is to the effect, that where a bill for specific performance is filed after the expiration of the interest, or so shortly before its expiration, as that according to the ordinary course of the court a decree cannot be made till after it shall have determined, the bill will be dismissed; but that where the plaintiff is at the filing of the bill entitled to specific performance, and the delay which causes the expiration of the interest before the hearing is due entirely to the constitution of the court, the plaintiff will be entitled to an account, or other equitable relief to which he may show a right, and perhaps to the execution of a legal instrument, where that would confer on him important legal rights to which he was entitled at the filing of the bill.

§ 607. In case of an agreement, legal at the time it was entered into, but subsequently and before decree rendered illegal by statute, it would seem to be clear on principle that no specific performance could be granted except in cases where the court can still execute the contract *cy pres*: (*c*) a contract thus rendered illegal would in the contemplation of the court have become impossible. (*d*)

[*270]

*CHAPTER XIX.

OF DEFAULT ON THE PART OF THE PLAINTIFF.

§ 608. WITH regard to the matters to be done by the plaintiff according to the terms of the contract, it is, from obvious principles of justice,

(*b*) *Kenney v. Wexham*, 6 Mak. 355. See *Strickland v. Turner*, 7 Ex. 208.

(*c*) See post, § 667 et seq.

(*d*) *Atkinson v. Ritchie*, 10 East, 530, 534; *Barker v. Hodgson*, 3 M. & S. 267; *Esposito v. Bowden*, 4 Ell. & Bl. 963. See also *Winnington v. Briscoe*, 8 Mod. 51, and ante, § 307.

incumbent on him, when he seeks the performance of the contract, to show, first that he has performed, or been ready and willing to perform, all essential(*a*) terms of the contract on his part to be then performed; and secondly, that he is ready and willing to do all matters and things on his part thereafter to be done; and a default on his part in either of these respects furnishes a ground upon which the suit may be resisted.(*b*)

§ 609. We will first consider cases of default in respect of acts which ought to have been already done.

§ 610. The performance to be shown by the plaintiff extends not only to the terms of the contract itself, but to representations made at the time of the contract of future acts, on the faith of which the contract was made.(*c*) Thus where a vendor at a sale represented that he would make improvements in the access to the property sold, and failed to do so, the court refused specifically to perform his contract;(d) and again, the same was the decision of the court in a case where the vendor, by his agent, represented that a *church should be erected in the [*271] immediate neighbourhood of the building ground which was the subject of the contract, and that he would complete certain streets, and the purchase was made on the faith of these representations, which the plaintiff however never carried into effect.(e)

§ 611. We may here briefly inquire into how far maps or plans of the property, exhibited by the vendor at the time of entering into the agreement, form representations of the kind we are now considering.

§ 612. Where the parties have matured their agreement into a contract, and that contract is silent on the subject of such map or plan, the court will not from such exhibition infer a contract.(f) This applies alike to private contracts and to special acts of parliament, so that notices given, and plans and sections deposited, are not to be used in construing an act afterwards, except so far as they are referred to, and thus incorporated in the act of parliament itself.(g)

§ 613. Where the map thus exhibited delineates the intended division of the property by new roads, the vendor may not afterwards divide the land in a manner so different as to attract a population entirely different from that which would have been produced by the carrying out of the plan proposed by the map.(h)

§ 614. But though the exhibition of a map may bind to this extent, it will not oblige to an exact performance of the scheme it embodies. Thus where a plan was referred to in the contract, and used as a description of the part of the property in question, and on this plan the measurement and width of the street were marked, but there was *nothing [*272] in the agreement which distinctly pointed out that part of the

(*a*) 2 Eq. Cas. Abr. 33.

(*b*) See post, § 616.

(*c*) As to what representations will in equity be considered as part of the contract, see the chapter on Misrepresentation, ante, § 425 et seq.

(*d*) Beaumont v. Dukes, Jac. 422.

(*e*) Myers v. Watson, 1 Sim. N. S. 523.

(*f*) Feoffees of Heriot's Hospital v. Gibson, 2 Dow, 301; Squire v. Campbell, 1 My. & Cr. 459.

(*g*) North British Railway Company v. Tod, 12 Cl. & Fin. 722; Beardmer v. London and North-western Railway Company, 1 M.N. & G. 112.

(*h*) Peacock v. Penson, 11 Beav. 355, 361.

plan as binding the parties to the agreement, the master of the rolls held that it did not form part of the agreement, so as to entitle one party to relief against an encroachment on the width of the street.(i) In another case the particulars referred generally to an accompanying plan, and on the plan several roads were marked out so as to provide frontages for all the lots, and the lines of roads were marked out on the land itself in accordance with the plan : Sir J. L. K. Bruce, then vice-chancellor, held that in the absence of any clause in the particulars or conditions of sale providing for any rights of way beyond a road leading into the nearest highway, such road was all that the purchaser was entitled to.(k)

§ 615. Where the sale plan, instead of, as in the previous cases, representing an intended and future state of the property, accurately represents it in its actual and present state, it has been held that it will not carry the case higher than a view of the property. Therefore where a plan represented a well on lot 4 communicating with a reservoir on lot 2, and that communicating with the inn which was the lot 1 which the plaintiff purchased, and the vendor conveyed lots 2 and 4 without any reservation to the plaintiff of a right to a flow of water from the well, the plaintiff's demand for compensation for the loss of the water was refused.(l) Lord St. Leonards, however, considers this case as open to observation.(m)

§ 616. In the averment of performance by the plaintiff, equity, as already stated, discriminates between the essential and the non-essential terms of a contract; and to furnish the defendant with a ground for resisting the bill, the non-performance of the plaintiff must be of a term [*273] important *and considerable. The court frequently interferes at the instance of a party who may be debarred from relief at law, because unable to allege performance in the very terms of the contract, which is essential at law.(n) Thus, for example, where A. contracted to sell property to B., and by the same agreement it was also stipulated that A. should continue tenant from year to year of the land, and it happened that from embarrassed circumstances he was unable to fill the tenancy, this was, from the determinable nature of the holding, held to be a matter of no consideration, and so not a bar to specific performance of the contract for sale.(o) And all the cases in which the court grants a vendor asking for specific performance indulgence in the making out of his title,(p) or allows him to enforce the contract with compensation,(q) are, of course, illustrative of the principle now before us.

§ 617. Where that, on the non-performance of which by the plaintiff the defendant relies, is in its nature a collateral and separate contract, or is part of or referable to such a contract, though between the same parties and entered into at the same time, and having relation to the same subject-matter as the contract which the plaintiff seeks to enforce, the court will not consider the default by the plaintiff in respect of the

(i) *Nurse v. Lord Seymour*, 13 Beav. 254.

(k) *Randall v. Hall*, 4 De G. & Sm. 343.

(l) *Fewster v. Turner*, 11 L. J. Ch. 161.

(m) *Vend. 20.*

(n) See per Lord Redesdale in *Davis v. Hone*, 2 Sch. & Lef. 347; ante, § 4.

(o) *Lord v. Stephens*, 1 Y. & C. Ex. 222.

(p) See post, § 871 et seq.

(q) See post, § 791 et seq.

one contract as any bar to the specific performance of the other, though such default may give him a cross right of action or suit.(r) Thus where A. agreed with B., the owner of a plot of land, to erect a villa on it, and to keep it insured in the joint names of A. and B., in the county fire office, and B. agreed as soon as the house should be completed, to grant a lease of the plot to A., and that if A. should not perform his part, the agreement for the lease should be void ; and the agreement also stipulated that A. *should have the option of purchasing the fee within [*274] two years : A. erected the villa, but insured in a wrong office, and in his own name alone ; and then brought his bill for a sale under the option to purchase, and it was held by the master of the rolls that this option was independent of the right to a lease, and that notwithstanding the plaintiff's default in respect of the latter right, the former subsisted, and he accordingly decreed a specific performance.(s)

§ 618. And so, where in a deed for the dissolution of partnership, one partner assigned to another certain foreign shares, and covenanted for further assurance ; and the other partner covenanted with the former for indemnity against certain liabilities : a further assurance of the shares became necessary, and on a bill filed to enforce specific performance of the covenant to that effect, it was held by the lords justices, overruling the master of the rolls, that a breach of the covenant to indemnify which the plaintiff had entered into with the defendant was no defence to the suit. The two covenants were independent, so that the performance of the one was not to be resisted by reason of the non-performance of the other.(t)

§ 619. Actual performance may in some cases be excused, and readiness and willingness to perform be enough. Where the facts stated in the bill, or appearing on evidence, show that a tender of performance by the plaintiff would have been refused, that renders such tender unnecessary.(u) And still more clearly, if possible, is non-performance by the plaintiff excused when that has resulted from the neglect or default of the defendant.(v)

§ 620. With regard to infancy, an infant heir cannot *avail himself of his disability to excuse the non-assertion of his right [*275] under an executory contract made with his ancestor, when the immediate performance of his part of the contract is essential to the interest of the other party ; as, for example, of an agreement to lay out money in building within three years.(w)

§ 621. We shall now consider how far the impossibility of performing the plaintiff's part furnishes an excuse for non-performance. (1) In those cases in which all that was to have been performed by the plaintiff has become entirely incapable of being executed, the plaintiff cannot demand

(r) *Phipps v. Child*, 3 Drew, 709.

(s) *Green v. Low*, 22 Beav. 625.

(t) *Gibson v. Goldsmid*, 5 De G. M. & G. 757 ; S. C. 18 Beav. 584.

(u) *Hunter v. Daniel*, 4 Ha. 420 ; per Lord Ellenborough, in *Seaward v. Willock*, 5 East, 202 ; *Poole v. Hill*, 6 M. & W. 835 ; *Wilmot v. Wilkinson*, 6 B. & C. 506. See also *Lovelock v. Franklyn*, 8 Q. B. 371 ; *Doogood v. Rose*, 9 C. B. 131.

(v) *Hotham v. East India Company*. 1 T. R. 638.

(w) *Griffin v. Griffin*, 1 Sch. & Lef. 352.

the performance by the other party, because his non-performance is a total failure of the consideration which was to have moved from him.

§ 622. (2) But where the impossibility refers not to the substantial, but only to the exact and literal performance of the contract, the court will struggle with matters of form in order to do complete justice between the parties; but it will carefully avoid going so far as to make a new contract between them.(x) Hence arise the cases on compensation.(y)

§ 623. (3) In those cases in which the plaintiff has performed a substantial part of his contract, and then the remaining part has become impossible by reason of circumstances not dependent upon him and without his fault, a distinction has been drawn between those cases in which the plaintiff is *in statu quo* as to that part of the contract which he has performed, and those cases in which he is not *in statu quo*; equity refusing to enforce performance of the contracts by the other party in the former case, and enforcing it in the latter. This distinction rests almost entirely on the authority of Lord Chief Baron Gilbert, in a passage in [*276] his 'Lex Prætoria,'(z) but has been approved by subsequent writers(a) and seems agreeable to the principles of justice. "Here," says his lordship in the passage in question, "it is to be noted that the plaintiff that exhibited his bill upon the foot of performing the bargain on his part, ought to show that he has performed all that is to be done on his part, or is ready to do it; for where any part (which he should have performed) is become impossible to be performed at the time of exhibiting his bill, then he can have no specific execution, because he cannot specifically execute on his own part: as in the case of my Lord Feversham, which was on a marriage agreement, whereby he contracted to settle the manor of Holmly on his wife and the heirs of their bodies, and clear it of incumbrances, and settle a separate maintenance on his wife, and likewise sell some pensions in order to make a further provision for his wife and the issue of that marriage; and Sir George Sandys, the father-in-law, agreed to settle £3000 per annum on the Lord Feversham for life, remainder to the wife for life, and so to the issue of the marriage. Lord Feversham cleared the Manor of Holmly, settled it accordingly, and settled the separate maintenance, but did not sell the pensions, nor settle the further provisions: the wife died without issue, and the Lord Feversham preferred his bill to have the £3000 per annum settled on him during his life: but decreed because Lord Feversham was *in statu quo* as to all that part of the agreement which he had performed and, having not performed the whole, and the other parts being now impossible, and no compensation being possible to be adjusted for it, he had no title in equity to have performance of Sir George's part of the agreement, since such performance could not be mutual. But the issue of Lord Feversham might have been relieved, because in no default. *Lord Feversham v. Watson*, Rep. t. Finch, 445, 2 Freem. 35, Skin. 287.

(x) *Counter v. Macpherson*, 5 Moo. P. C. C. 83, 108.

(y) See post, § 791 et seq. (z) pp. 240-242.

(a) 1 Fonbl. Eq. Book i. c. 6, s. 3; Story, Eq. Jur. s. 772.

*§ 624. "But if a man has performed so much of his part of the agreement as he is not *in statu quo*, and is in no default for not performing the residue, then he shall have a specific execution from the other party of the agreement: as if a man has contracted for a portion with his wife, and has agreed to settle upon the wife and her issue, lands of such a value free from incumbrances, and he sells part of his land to disencumber and is going on to disencumber and settle the rest: then if the wife dies without issue before the settlement be actually made, yet he shall have a portion, because he cannot be *in statu quo*, having sold part of his lands, and there is no default in him, since he was going on to disencumber and settle the rest; therefore the accident of the death of his wife doth not alter his right to his wife's portion. *Meredith v. Wynn*, Eq. Abr. 70, p. 15; *Gilb. Eq. Rep.* 70; *Prec. Ch.* 312; *2 Vern.* 448."

§ 625. In respect of marriage contracts, an exception to the general principle before us exists, for the obvious reason that the parties to the contract are not the only parties having an interest in the subject, but the contract is made by them on behalf of the issue of the marriage; (*b*) and it is evident that though A.'s default may bar his suing B., A.'s default cannot bar C.'s rights against B. "There is," said Lord Hardwicke, (*c*) "a difference between agreements on marriage being carried into execution and other agreements; for all agreements besides are considered as entire, and if either of the parties fail in performance of the agreement in part, it cannot be decreed in specie, but must be left to an action at law: in marriage agreements it is otherwise, for though either the relations of the husband or wife should fail in the performance of their part, yet the children may compel a performance: if the mother's father, for instance, hath agreed to give a portion, *and the husband's father hath agreed to make a settlement, though the mother's father do not give the portion, yet the children may compel a settlement, for non-performance on one part shall be no impediment to the children's receiving the full benefit of the settlement; so if there be a failure on the part of the father's relations, it is the same." The same principle was acted on by the same judge in another case, (*d*) where the heirs of the husband were compelled to settle the jointure, though the husband had never received the portion which the wife's father contracted to pay; and the doctrine has been acted upon and upheld in numerous other cases both of early and late date. (*e*)

§ 626. This exception with regard to marriage contract applies, however, only under certain limitations. For (1) it is unquestionable that even in marriage articles the covenants may be so framed as to be mutually dependent, and this intention, if clearly expressed, will prevail. (*f*)

§ 627. (2) The defaulting party himself or those claiming under him

(*b*) Per Lord Cottenham in *Lloyd v. Lloyd*, 2 My. & Cr. 204.

(*c*) In *Harvy v. Ashley*, 3 Atky. 611.

(*d*) *Perkins v. Thornton*, Ambl. 502.

(*e*) *Hancock v. Hancock*, 2 Vern. 605; *North v. Ansell*, 2 P. Wms. 618; *Pyke v. Pyke*, 1 Ves. Sen. 376; *Ramsden v. Hylton*, 2 Ves. Sen. 304; *Lloyd v. Lloyd*, 2 My. & Cr. 192; *Campbell v. Ingilby*, 21 Beav. 567; S. C. 26 L. J. Ch. 654. (L.J.J.) In *Cubitt v. Blake*, 19 Beav. 454, the settlement was post-nuptial, and the question of the rights of the issue was not raised.

(*f*) *Lloyd v. Lloyd*, 2 My. & Cr. 192, 204.

as assignees cannot gain the advantage of the contract of the other party.(g) If a woman were on her part to contract for the settlement of an estate which would give a benefit to the husband, and the husband were to contract for the benefit, and the wife made default on her part, "that," said Lord Redesdale,(h) "might be a case in which the wife should not be allowed to have the benefit of the husband's contract: but that would not affect the children,—they must have the estate."

[*279] *§ 628. (3) Where the marriage settlement, by reason of the course of events, fails with respect to the acts to be done by the wife, collaterals who are not within the scope of the marriage contract cannot enforce upon the husband the performance of the acts contracted to be done by him. This appears to have been decided in the case of *Savill v. Savill*,(i) where the husband on marriage settled the personal property of the wife upon his wife and himself and their children, with a remainder to her next of kin, and covenanted that upon his wife's coming of age her real estate should be similarly settled, but with the ultimate remainder to her heirs: the wife attained her majority, and about a month afterwards died without issue and without having settled the real estates, leaving her sister her sole heiress and next of kin; and it was held that this sister could not compel a conveyance to herself of the real estate, without making compensation to the husband out of the personal estate for the loss of the real estate, which he would have taken under the settlement had it been executed by his wife.

§ 629. The doctrine of compensation would not apply to appointees of the wife, who are regarded as purchasers under the settlement.(k)

§ 630. We may now consider the obligation which lies on the plaintiff, in a suit for specific performance, of being ready and willing to perform all acts that, on his part, yet remain to be performed.

§ 631. On the ground of this obligation, assignees in bankruptcy are not able as plaintiffs to enforce a contract entered into by the bankrupt, which would have involved covenants on his part, unless they will personally enter into the covenants into which the bankrupt would have [*280] *entered :(l) whereas in the converse case, where specific performance is sought not by, but against persons having a fiduciary interest only, they are bound to covenant only so as to bind the property and not themselves personally.(m)

§ 632. And so of bankrupts: if the plaintiff be the vendor, the com-

(g) *Mitford v. Mitford*, 9 Ves. 87, 96; *Basevi v. Serra*, 14 Ves. 313.

(h) *In Crofton v. Ormsby*, 2 Sch. & Lef. 602, 603.

(i) 2 Coll. C. C. 721; per M. R. in *Campbell v. Ingilby*, 21 Beav. 579.

(k) *Campbell v. Ingilby*, 21 Beav. 567, affirmed on the ground of the negligence of the plaintiff, 26 L. J. Ch. 654, (L.J.J.)

(l) *Ex parte Sutton*, 2 Rose, 86; *Willingham v. Joyce*, 3 Ves. 168; *Powell v. Lloyd*, 2 Y. & J. 372; per Sir Wm. Grant in *Weatherall v. Geering*, 12 Ves. 513.

(m) *Page v. Broon*, 3 Beav. 836; *Phillips v. Everard*, 5 Sim. 102; *Stephens v. Hotham*, 1 K. & J. 571; and see further as to covenants by trustees, *Worley v. Frampton*, 5 Ha. 560; *Onslow v. Lord Londesborough*, 10 Ha. 67; *Copper Mining Company v. Beach*, 13 Beav. 478; *Hodges v. Blagrave*, 18 Beav. 404; *Hare v. Burges*, 4 K. & J. 45.

mission of an act of bankruptcy, though without proof of the existence of any debt to support a petition is a bar to a suit for specific performance, because the plaintiff may be incapable of conveying the estate, which may belong not to him, but to his assignees.(n) If, on the other hand, the plaintiff be the purchaser, he cannot enforce the contract, because he is incapable of so paying the money to the vendor, as that the vendor shall be certain of being able to retain it against the assignees.(o)

§ 633. Bankruptcy does not of itself discharge a contract, either for the sale of an estate of inheritance or for a lease ; for, with regard to the latter, the assignees may covenant in the same manner as the bankrupt would have been bound to.(p) By the 146th section of the statute, 12 & 13 Vict., c. 106, the vendors of lands may compel the assignees to elect whether they will abide by or decline an agreement for sale.

§ 634. So the insolvency of the plaintiff is a ground of defence :(q) and, to constitute this defence in the case of a continuing contract as a lease, it is not necessary that the plaintiff should be proved to have taken the benefit of the *acts for the benefit of insolvent debtors, or to [*281] have given up all his property for the benefit of his creditors, but there must be proof of general insolvency, so as to show that the plaintiff is not in a situation to perform the covenants on his part.(r) Thus Lord Eldon, remarking on the insolvency of an intended lessee as being an objection of more or less weight depending on the circumstances, in the case then before him dissolved an injunction against an ejection by the landlord.(s)

§ 635. How far insolvency would be an objection, if the plaintiff had subsequently become affluent, does not appear to be decided.(t)

§ 636. Where the interest under an agreement has been assigned, the insolvency of the original contractor, who is the assignor, is no defence, though that of the assignee would be.(u)

§ 637. On like grounds, the felony of a plaintiff would be a bar to specific performance.(v)

§ 638. And the same principle is illustrated by a case where the deeds were destroyed. It was a suit by a vendor on an ordinary contract for sale of lands ; in such a contract is implied as an essential term on the part of the vendor, the proof of the due execution of the deeds which constitute his title, and the delivery up of them to the purchaser : the deeds having been subsequently destroyed by fire, the performance of this term by the plaintiff was rendered impossible, and the contract could not be specifically performed.(w)

(n) Lowes v. Lush, 14 Ves. 547.

(o) Franklin v. Lord Brownlow, 14 Ves. 550.

(p) Brooke v. Hewitt, 3 Ves. 253.

(q) Crosbie v. Tooke, 1 My. & K. 431 ; Price v. Assheton, 1 Y. & C. Ex. 441.

(r) Neale v. Mackenzie, 1 Ke. 474; Willingham v. Joyce, 3 Ves. 168.

(s) Buckland v. Hall, 8 Ves. 92.

(t) Price v. Assheton, 1 Y. & C. Ex. 82, 91.

(u) Crosbie v. Tooke, 1 My. & K. 431.

(v) Willingham v. Joyce, 3 Ves. 168.

(w) Bryant v. Busk, 4 Russ. 1.

[*282]

*CHAPTER XX.

OF ACTS IN CONTRAVENTION OF THE CONTRACT.

§ 639. In the last chapter we considered cases in which the plaintiff had disentitled himself by default on his part: we shall now consider the closely allied cases where he has disentitled himself, not by default merely, but by acts in fraud of the contract, tending to its rescission and the subversion of the relation established by it. For where the party to a contract who asks the intervention of a court of equity for its specific execution, has been guilty of conduct in contravention of the contract, that circumstance may be put forward as a defence to the suit, in the light either of a rescission of the contract,(a) or as a personal objection to the plaintiff,(b) and will form a bar to specific performance.

§ 640. This defence rests on obvious principles of justice. If the acts are such as would have worked a forfeiture of all benefit of the contract if it had been executed, then it would be idle for the court to compel a grant of that which, if granted, would have been forfeited,(c)—to create a legal relation which, if created, would be immediately dissoluble.(d)

§ 641. And even where such is not the result of the plaintiff's conduct, it may furnish a defence, on the ground *that a party who [*283] asks the court to enforce an agreement in his favour must prove that he has on his part performed, or been ready and willing to perform, the agreement in all its material and essential terms :(e) and that the plaintiff who would have equity must do equity.

§ 642. The cases by which this principle is most extensively illustrated are on agreements for leases. With regard to these, it is well established that where a person, holding under an agreement, commits waste, treats the land in an unhusbandlike manner, or acts in breach of covenants which would be contained in the lease, and for which acts a right of re-entry would accrue to the landlord, such person cannot enforce a specific performance of the agreement.(f) The same has been held in respect of covenants to repair.(g)

§ 643. It seems that even where the lease, when executed, would contain no proviso for re-entry, yet such acts might prevent a specific performance of the agreement :(h) they may amount to a personal disqualification of the plaintiff, though not to a forfeiture of the legal interest.

§ 644. In *Gordon v. Smart*,(i) where an agreement to grant a building lease had been entered into, and the plaintiff, claiming under this

(a) Per Lord Eldon in *Knatchbull v. Gruuber*, 3 Mer. 142.

(b) Per Lord Eldon in *Boardman v. Mostyn*, 6 Ves. 472.

(c) Per M. R. in *Lewis v. Bond*, 18 Beav. 87.

(d) Per V. C. Turner in *Gregory v. Wilson*, 9 H. 687.

(e) *Walker v. Jeffreys*, 1 H. 341.

(f) Per Lord Eldon in *Hill v. Barclay*, 18 Ves. 63; *Lewis v. Bond*, 18 Beav. 85; *Gregory v. Wilson*, 9 H. 683.

(g) *Nunn v. Truscott*, 3 De G. & Sm. 304.

(h) See per Lord Eldon in *Duke of Somerset v. Gourlay*, 1 V. & B. 73.

(i) 1 S. & S. 66.

agreement, had erected a brew-house on part of the ground, which, it was contended, would be an injury to the adjoining property of the lessor ; this was argued, but unsuccessfully, as a reason for refusing specific performance, the vice-chancellor saying that it was not necessarily a nuisance : he left open the question whether, if it had in itself been a nuisance, that would have been a defence in such a suit.

§ 645. In *Thompson v. Guyon*,^(k) where there was a lease [*284] *granted with a proviso for re-entry on breach of any of the covenants, and a covenant to grant a further term at the end of the original term, if it should not have been sooner determined by the lessee's acts or defaults : the lessee paid all his rent, and continued in possession to the end of the term, but had in fact committed breaches of covenant during the term, of which the lessor was not cognizant till after its determination ; a bill for specific performance of the covenant to renew was dismissed, and an injunction against an ejectment was refused, on the ground that the lessor ought not to be placed in a worse position at the expiration of the term than he would have been if he had known of the breach, and availed himself of it during the term.

§ 646. In a recent case,^(l) in which there was a conflict of evidence whether there had been any breaches of the covenants which the agreement provided should be contained in the lease, the court granted specific performance on the ground of part performance, but enabled the plaintiff to try the question of breach of covenant, by directing the lease to be dated antecedently to the alleged breaches, and putting him on terms to admit in any action that the lease was executed on the day of its date.

§ 647. Where an estate was sold upon the condition, amongst others, that immediate possession should be given, and in the course of disputes which subsequently arose about the title, the vendors tendered the purchaser his deposit, demanded back possession, drove the purchaser's stock off the estate, and gave notice to the tenants not to pay their rent to him,—this was conduct inconsistent with the condition of the sale, and was held to operate as a rescission of the contract, and a bar therefore to specific performance at the suit of the vendors.^(m)

*§ 648. It seems that under the Irish tenantry acts, and perhaps even independently of them, the breach by the tenant of [*285] covenants in the lease will not be a bar to specific performance of a covenant for renewal.⁽ⁿ⁾

§ 649. Having thus stated and illustrated the general principle, we may now consider the limitations to which it is subject. It seems, therefore, in the first place, that where a plaintiff has been guilty of small breaches of good faith, but for such breaches the defendant had a remedy in his own hands, and if the interference of the court were refused, the plaintiff would be without any adequate remedy, those breaches

(k) 5 Sim. 65.

(l) *Price v. Coombs*, 1 De G. & J. 34.

(m) *Knatchbull v. Gruuber*, 1 Mad. 153 ; S. C. 3 Mer. 124 ; S. C. 3 Sm. & Gif. 449.

(n) *Trant v. Dwyer*, 2 Bli. N. S. 11. See *Thompson v. Guyon*, 5 Sim. 65.

of good faith will not be an absolute bar to relief, though the court will disallow the plaintiff all costs.(o)

§ 650. It seems further that where the default on the part of the plaintiff is not wilful, such non-performance will not be a bar: so where a lessor of mines covenanted to grant a further term, and the lessee covenanted to work the mines, on a suit by the lessee for a specific performance of the covenant to grant a further term, it appeared that the lessee had not worked the mines in consequence of their being drowned out: the court, though it did not decide the point, inclined to think that this would be no bar to relief.(p)

§ 651. So, too, breaches of covenants that are merely nominal will not bar specific performance.(q) But the breach must be so trivial as that a court of equity would relieve against a forfeiture at law; for the court will not relieve more readily whilst the whole thing rests in contract, than it will after the legal relation has been actually created.(r)

[*286] § 652. A mere waiver in law of such breaches of a *contract will not in all cases prevent the defendant from urging them as an objection to the execution of the contract in equity, because they may still form a personal disqualification to the plaintiff, and induce the court to consider whether the defendant ought to be put in the power of such a tenant.(s) But where the acts are not such, but are relied on as operating a forfeiture, there the court must be well satisfied that there is a forfeiture on which an ejectment could be maintained, before it will, by refusing performance, prevent the question of forfeiture being tried at law :(t) and if a landlord has never complained of the conduct of his tenant, but permitted him to act on the faith of the contract, it would require a strong case to enable the landlord to raise such objections for the first time, when the tenant claimed the benefit of the agreement.(u)

§ 653. We have elsewhere seen that the plaintiff may disentitle himself from enforcing the performance of a contract by acts which, though not in direct contravention of his part of it, have yet effected such a change in the relative position of the parties as to render it inequitable in the plaintiff to insist on the execution of the contract.(v)

§ 654. A CONTRACT may be originally conditional, and contingent upon the performance of some act or the happening of some event. Where

(o) *Holmes v. Eastern Counties Railway Company*, 3 Jlr. N. S. 737, (Wood, V. C.)

(p) *Walker v. Jeffreys*, 1 Ha. 341.

(q) *Walker v. Jeffreys*, 1 Ha. 341; *Pain v. Coombs*, 3 Sim. & Gif. 449.

(r) *Gregory v. Wilson*, 9 Ha. 683. (s) *Boardman v. Mostyn*, 6 Ves. 467.

(t) *Per V. C. Turner in Gregory v. Wilson*, 9 Ha. 691.

(u) *Mundy v. Jolliffe*, 5 My. & Cr. 167, 177, reversing S. C. 9 Sim. 413.

(v) See ante, § 256.

that has occurred, the contract becomes absolute, and rests on the same footing for all purposes as if it had been originally made positively and without reference to any contingency.(a) But until it has thus become absolute, no person can be entitled to call for its performance. Where, therefore, the contract is in its origin conditional, it may afford a ground of defence that the condition has not been performed.

§ 655. A contract may be conditional either by express words of condition, or because the court, upon a consideration of its terms, gathers that to have been the intention of the contracting parties. This is of course a question to be decided on the terms of each contract. It will, therefore, be sufficient briefly to allude to two or three recent cases of practical moment.

§ 656. In the case of contracts by railway companies, the question has sometimes arisen how far they are conditional on the formation of the railway. In one case,(b) where a company before incorporation contracted with a landowner, the contract provided for a bridge over the *railway, a certain deviation of the line and other works entirely dependent on its formation, and for the payment of £4500 as [*288] purchase-money for certain lands to be taken by the company, and for consequential damage to the land-owner's estate. The contract was expressly conditional on the act passing. It passed, but the railway was abandoned, and the time for taking the lands had expired. Nine-tenths of the agreement, as Lord Justice Knight Bruce remarked, had become impracticable by reason of the abandonment of the railway: and the lords justices, though not deciding the point, evidently inclined to the opinion that the contract was conditional, not only on the passing of the bill, but on the making of the railway. And in the subsequent case of Lord James Stuart v. London and North-western Railway Company,(c) Lord Cranworth expressed a similar opinion. These cases have been doubted,(d) but rather on the point of jurisdiction than of the construction of the contracts: and they have certainly received great support from the case of Gage v. Newmarket Railway Company.(e) There the company had covenanted with the plaintiff that, in the event of a bill for extending their powers being passed in the then present session, the company should, before they should enter on any part of the plaintiff's lands, pay him £4900 purchase-money for any portion of his land, not exceeding forty-three acres, which the company might require and take, and £7100 as landlord's compensation for damages arising by the severance thereof. It was held that the covenant was not for the payment of an absolute sum as a consideration for the plaintiff's withdrawing his opposition, but a payment as purchase-money and compensation for

(a) Per M. R. in Regent's Canal Company v. Ware, 23 Beav. 586.

(b) Webb v. Direct London and Portsmouth Railway Company, 1 De G. M. & G. 521.

(c) 1 De G. M. & G. 721. See also 5 Ho. Lords, 351.

(d) Hawkes v. Eastern Counties Railway Company, 1 De G. M. & G. 737; S. C. 5 Ho. Lords, 331.

(e) 18 Q. B. 457. See also Edinburgh, Perth, and Dundee Railway Company v. Philip, 2 M^tQ. 514.

[*289] severance, which *could not be due when no land was required or taken, and no severance effected for which compensation could arise.

§ 657. The performance of conditions precedent may of course be waived by the persons entitled to their performance.(f)

[*290]

*CHAPTER XXII.

OF THE INCAPACITY OF THE DEFENDANT TO PERFORM HIS PART OF THE CONTRACT.

§ 658. The incapacity of the defendant to carry the contract into execution affords a ground of defence in a suit for specific performance.(a) This contention does not, like that grounded on the incapacity of the plaintiff to perform his part, rest upon any principle of justice that operates in favour of the defendant, but upon the necessity of the case arising out of the nature of the relief sought.

§ 659. Where a bill was filed against the provisional committee of a projected railway company for the specific performance of an agreement to deliver to the plaintiff a certain number of scrip certificates; there being no allegation that the defendants had any scrip which they could deliver, but a statement from which the contrary might rather be inferred, a demurrer was allowed on the ground that the bill did not show any capacity in the defendants to perform the contract.(b) So where a defendant showed that he had sold the property in question for a valuable consideration to a third party, no performance could be enforced :(c) and so, again, assuming that a covenant to produce deeds can be obtained by way of specific performance of a covenant for further assurance, it seems that the court *will not attempt so to carry it into effect where

[*291] the deeds are not in the proposed covenantor's power.(d)

§ 660. It is not necessary to the specific performance of a contract, that it should be one which the parties at the time of entering into it had the power of carrying into effect, nor one with regard to which it depends on themselves alone whether they would ever be able to perform it. For where a party enters into a contract without at the time having the power of performing it, and afterwards acquires that power, he is bound to perform the agreement he had entered into.(e) Therefore a defendant cannot object at an early stage of a suit for specific performance that he has not the interest he has contracted to sell, as he cannot be permitted to say that he did not mean to acquire that interest.(f') And so where

(f) Beatson v. Nicholson, 6 Jur. 620.

(a) Per Lord Hardwicke in Green v. Smith, 1 Atky. 573.

(b) Columbine v. Chichester, 2 Phil. 27. See also Ellis v. Colman, 4 Jur. N. S. 350.

(c) Denton v. Stewart, 1 Cox, 258.

(d) Hallett v. Middleton, 1 Russ. 243.

(e) Carne v. Mitchell, 15 L. J. Ch. 287.

(f') Per Lord Eldon in Browne v. Warner, 14 Ves. 412.

a defendant had agreed to give a certain indemnity to be secured on real estate, and alleged that he had not real estate of sufficient value, and contended that the plaintiff ought to accept a personal indemnity, it was held that he was bound to purchase real estate of sufficient value.(g)

§ 661. The same principle is exemplified in a case(h) which was decided in the 34th year of Charles II. During the civil wars the then duke of Newcastle had gone abroad, and whilst he was thus absent, the defendant, who was his heir apparent, without authority from the then duke, sold and conveyed to the plaintiff certain estates of the duke, and received the purchase-money, and applied it for the benefit of the family. The defendant having subsequently succeeded to the dukedom and the estates in question as heir, he was, by the lord chancellor, held bound to make good his sale, and was decreed to do so accordingly. At the time of the contract, specific performance would have been impossible [*292] *on the part of the defendant, but it had subsequently become possible by the devolution of the estate contracted to be sold.

§ 662. On the same principle the court will not consider as void, contracts, whether by private persons or companies, which require the interposition of the legislature before they can be carried into effect, and accordingly will in the meanwhile protect the property in issue.(i)

§ 663. With regard to real estate, the statute of the 32 Hen. VIII. c. 9, prevents the sale of a pretended right to land by a person out of possession; but if a person, instead of selling a pretended right, contracts on a certain future day to convey an estate, and he is on that day possessed of it, the contract appears not to be within the operation of the statute, and to be binding on both parties.(k)

§ 664. And so also with regard to goods, the legality of contracts for the sale of such property not at the time in the possession of the vendor is now well established;(l) so that notwithstanding an opposite decision of Lord Macclesfield,(m) such a contract would now probably be enforced if it were to fall under the jurisdiction of the court.

§ 665. As the consent of a third party is, or may be, a thing impossible to procure, a defendant who has entered into a contract to the performance of which such consent is necessary, will not, in case such consent cannot be procured, be decreed to obtain it, and thus perform an impossibility.(n)

(g) *Walker v. Barnes*, 3 Mad. 247.

(h) *Clayton v. Duke of Newcastle*, 2 Cas. in Ch. 112.

(i) *Great Western Railway Company v. Birmingham and Oxford Junction Railway Company*, 2 Phil. 597; per Lord St. Leonards in *Hawkes v. Eastern Counties Railway Company*, 1 De G. M. & G. 756; *Devenish v. Brown*, 26 L. J. Ch. 23 (Wood, V. C.); *Frederick v. Coxwell*, 3 Y. & J. 514. As to contracts requiring proposed legislation to render them legal, see *Mayor of Norwich v. Norfolk Railway Company*, 4 Ell. & Bl. 397.

(k) *De Medina v. Norman*, 9 M. & W. 820; and see further as to this statute, § 130.

(l) *Hibblethwaite v. M'Morine*, 5 M. & W. 462.

(m) *Cuddee v. Rutter*, 5 Vin. Abr. 538, pl. 21.

(n) *Howell v. George*, 1 Mad. 1; *Grey v. Hesketh*, Ambl. 268; S. C. 3 Burn. Eccl. Law, 336, 5th edit. See also *Marsh v. Milligan*, 3 Jur. N. S. 979, (Wood, V. C.); *Beeston v. Stuteley*, Week. Rep. 1857, 1858, 266.

[*293] *§ 666. Where the husband, or husband and wife, have entered into a contract to sell the estate of the wife, the court used formerly to decree the husband to procure his wife's consent, and in default commit him to gaol until she yielded.(o) But the absurdity of such a course is obvious; because the court of chancery would be putting all the compulsion it could upon the wife to induce her to do an act, of which the essence is that it is done without compulsion; the court of chancery would be distressing her to give her consent, whilst the court of common pleas is examining her to see that she is acting from free will alone; and it is now accordingly established that the court will not interfere specifically to perform contracts where a wife's consent is requisite, and she refuses to give it.(p)

§ 667. It must not, however, be understood that the incapacity of the defendant to perform a contract literally and exactly in all its parts will be a bar to its performance. From the distinction acknowledged in courts of equity between the essential and the non-essential terms of a contract, it follows that where a contract cannot be performed literally, it may yet be performed *cypres*; and all the cases in which compensation is made by the defendant are illustrations of this deduction. Some further instances remain to be considered.

§ 668. Thus in *Carey v. Stafford*,(q) in the exchequer, in 1725, where a man executed a deed affecting to convey lands, therein described of the yearly value of £22, to his servant, and no such lands existed, the court compelled him to convey lands of equal value.

[*294] § 669. And so if a copyholder were to agree to grant a *lease for a longer term than the custom allowed, he would, it seems, be compelled to effectuate his contract in substance, by from time to time executing leases for such terms as he could, till he had made up the term contracted for.(r)

§ 670. Errington's case,(s) though not on a specific performance, is another illustration of this principle. He had contracted for £9000 to build a bridge over the Tyne, and to maintain it for seven years, and had entered into a bond in that sum conditioned for performance of the contract: the bridge was built, but thrown down by a flood: and it was found that no bridge on that scite could stand. Thereupon he filed his bill for relief from the bond; and upon his building a bridge upon a neighbouring scite where it could stand, and submitting to an issue of *quantum damnicatus* by the change of scite, he was relieved from the penalty of the bond.

§ 671. Where a contract in its original form is obnoxious to difficult-

(o) *Barrington v. Horn*, 5 Vin. Abr. 547, pl. 35; S. C. 2 Eq. Cas. Abr. 17, pl. 7; *Hall v. Hardy*, 3 P. Wms. 187; *Daniel v. Adams*, Ambl. 495; *Morris v. Stephenson*, 7 Ves. 474.

(p) *Bryan v. Wooley*, 1 Bro. P. C. 184; *Emery v. Wase*, 8 Ves. 505; *Frederick v. Coxwell*, 3 Y. & J. 514; *Howell v. George*, 1 Mad. 1; *Buck v. Whelley*, in D. P. 1 Mad. 7, n.; *Martin v. Mitchell*, 2 J. & W. 413, 425; per *Mansfield*, C. J. in *Davis v. Jones*, 1 N. R. 269.

(q) 3 Sw. 427, n.

(r) *Paxton v. Newton*, 2 Sm. & Gif. 437.

(s) Per Lord Redesdale in *Davis v. Hone*, 2 Sch. & Lef. 351; *Errington v. Aynesley*, 2 Bro. C. C. 341.

ties on the score of illegality, but it can nevertheless be lawfully performed in substance, the court will so model it as to effectuate this purpose. Thus it having been made by statute illegal to contract for the tenant to pay the tithe rent-charge, a contract for a lease stipulating that the tenant should pay a certain sum for rent and also the rent-charge, may be carried into effect by the court by means of a lease reserving as rent the two sums in the agreement treated respectively as rent and rent-charge.(t)

§ 672. And the court will probably be still more anxious to execute a contract *cy pres*, where by subsequent legislation a contract originally valid may have become invalid in part. Thus where a dean and chapter, prior to the disabling statute of 13 Eliz., covenanted for the renewal of a lease for ninety-nine years, and the plaintiff brought *his bill asking for a renewal for such term as the corporation could grant [*295] under the statute, it was ultimately decided by the house of lords, in accordance with the opinion of Sir Joseph Jekyll, but overruling the judgments of the Lord Chancellor King, Lord Chief Justice Raymond, and Mr. Justice Price, that the plaintiff was entitled to this *cy pres* relief.(u)

§ 673. It seems that in some cases in which the contract would be incapable of being specifically enforced in its very terms for other reasons than illegality, it may be executed by the court *cy pres* if such a plan be feasible. In one case(v) there was an agreement entered into by the defendants, within two years to procure the heir-at-law of A. B. to convey certain estates to the plaintiffs, or within the same period to petition the house of lords for, and to use their utmost endeavours to procure, an act of parliament for substituting a trustee in place of the heir, in case such heir could not be found, or there was no heir: on a bill filed for the performance of this agreement, the court decreed the defendants to allow their names to be used in an application to parliament for the act: an agreement by a person to use his utmost endeavours seems to be one which the court could not specifically execute.

§ 674. In some railway cases, the court has shown a great inclination to regard what it considers as the substance of the agreement. Thus, where company A. contracted with the plaintiff for the sale of the lands required for their proposed line, and for the withdrawal of his opposition in consideration of £20,000 to be paid to him, in case their bill should pass into law: there was a rival company B., which would require different lands of the plaintiff: by an agreement made between the two companies during the proceedings before the committee of the commons, it *was agreed that a reference should be made as to which [*296] of the two lines should be carried into effect, and that the successful company should take to all the engagements of the other. The line of company B. was approved, and company A.'s bill was accordingly withdrawn; company B. refused to pay the plaintiff the £20,000, alleging, amongst other things, that it was conditional on the bill of company A. passing, and that the lands required were not those contracted for: but

(t) *Carolan v. Brabazon*, 3 Jon. & L. 200.

(u) *Bettesworth v. Dean and Chapter of St. Paul's*, Sel. C. in Ch. 66, ante, § 9.

(v) *Frederick v. Coxwell*, 3 Y. & J. 514.

on a bill filed by the plaintiff against them, their demurrer was overruled by the vice-chancellor of England and Lord Cottenham.^(w) In a subsequent case,^(x) however, the same vice-chancellor considered the passing of a bill of an amalgamated company sufficiently distinct from the passing of the bill of one of the companies to relieve the amalgamated company from an agreement binding in case of the bill of the one company passing. The decree was affirmed by the lord chancellor, but on a different ground.^(y)

§ 675. Where an agreement is in the alternative, so as to give an election to the party to perform it, and one of the alternatives is at the time of the contract, or subsequently becomes, impossible, the question arises how far the contracting party is bound to the performance of the alternative that remains possible. The cases seem to divide themselves into (1) those where one alternative is impossible at the time of the contract, (2) where it subsequently becomes so by the act of God, or (3) by the act of the other party to the contract, or (4) by the act of a stranger. These different cases must be briefly considered.

§ 676. (1) Where at the time of the contract one alternative is impossible or void, the party to execute the contract [*297] is bound to the performance of the other alternative.^(z) So where the condition of a bond was to pay a certain sum, or render in execution a person who had been previously discharged, and the court held the latter alternative illegal and void, it was decided that the obligor was bound to perform the other, and that not having done so, the bond was forfeited.^(a) And where an award directed that a sum of money should be paid or be secured to be paid, and did not define the security to be given, and the question was whether the award was not void for uncertainty: it was held not to be so, on the ground that if an award direct one of two things to be done in the alternative, and one is void for uncertainty or is impossible, it is yet incumbent on the party to perform the other of them.^(b)

§ 677. (2) The leading authority on the second class of cases is Laughter's case,^(c) where it is laid down, "that where a condition of a bond consists of two parts in the disjunctive, and both are possible at the time of the bond made, and afterwards one of them becomes impossible by the act of God, the obligor is not bound to perform the other part." On this case it may be remarked in the first place, that the case itself did not require the enunciation of the principle,^(d) as both alternatives in the bond there put in suit were rendered impossible;^(e) and in the second place, it is to be observed, that subsequent decisions show that the

(w) Stanley v. Cheshire and Birkenhead Railway Company, 9 Sim. 264; S. C. 3 My. & Cr. 773.

(x) Greenhalgh v. Manchester and Birmingham Railway Company, 9 Sim. 416.

(y) 3 My. & Cr. 784. See further as to the results of amalgamation, Earl of Lindsey v. Great Northern Railway Company, 10 Ha. 664.

(z) Com. Dig. Condit. K. 2; Wigley v. Blackwal, Cro. Eliz. 780.

(a) Da Costa v. Davis, 1 B. & P. 242.

(b) Simmonds v. Swaine, 1 Taunt. 549.

(c) 5 Rep. 21, b.; S. C. s. n. Eaton's case, Moore, 357; s. n. Eaton v. Laughter, Cro. Eliz. 398; accordingly Warner v. White, T. Jon. 95.

(d) Barkworth v. Young, 4 Drew, 1, 24. (e) See the case in Cro. Eliz. 398.

principle was stated too broadly, and that even at law the intention of the parties will be gathered from the particular language of each instrument. In the case of *Studholmes v. Mandell*,^(f) the court said that the rule and reason *of Laughter's case ought not to be taken so largely as Coke has reported it, but according to the nature of [*298] the case; and *Treby, C. J.*, quoted a case in which on a bond conditioned either to make a lease for the life of the obligee before such a day or to pay £100, and the obligee died before the day, it was held in the common pleas that the obligor should pay the £100. And in *Drummond v. Duke of Bolton*,^(g) in an action on a bond conditioned to pay or secure to the plaintiff or her children, by William Ashe, her then intended husband, £3000 within six months after the defendant should become Duke of Bolton, the defendant pleaded that William Ashe died without having any children before the defendant became duke: but the plea was overruled, on the ground that the intention of the parties must be regarded, and that it could never have been their intention that the money should not be paid to the plaintiff in case she should not have a child by William Ashe at the time of the plaintiff's becoming duke, though if she then had a child, the defendant might have had his election to whom to pay the money.

§ 678. And this view of the law was fully supported in a recent case^(h) before Vice-Chancellor Kindersley, on a promise by A. on the marriage of his daughter with B., that he would at his death leave to his daughter an equal portion with his other children. The daughter died in the lifetime of her father, leaving children, and this circumstance was argued to be a discharge from the agreement by an act of God. But the vice-chancellor held that the agreement might have been performed in either of two ways,—namely, by A.'s making a provision for his daughter by will or by his dying intestate: and that though the death of the daughter precluded him from performing it in the first way, he was not thereby exonerated from performing *it in the second, and that the bill [*299] by which the husband prayed for an equal share in the testator's residuary estate, was not on that ground demurrable. His honor, after referring to some of the previous cases, expressed his opinion that it is impossible to lay down any universal proposition either way, and that each case must depend upon the intention of the parties: but that where this intention is clear that one of the parties shall do a certain thing, but he is allowed his option to do it in one or other of two modes, and one of these modes becomes impossible by the act of God, he is bound to perform it in the other mode: and that in the case before the court, it was manifestly the intention of the parties that, in one way or other, the daughter should have an equal share of the testator's property; and that if the father was prevented by the act of God from performing his obligation in one way, he was bound to perform it in the other way, which was possible.⁽ⁱ⁾

(f) 1 Lord Raym. 279; Anon. 1 Salk. 170.

(g) Say, 243. See also per Walmesley, J., in *More v. Morecomb*, Cro. Eliz. 864.

(h) *Barkworth v. Young*, 4 Drew, 1.

(i) p. 25. The rule of the civil law seems to agree with this. "Si quis illud

§ 679. In *Jones v. How*,^(k) a father on the marriage of his daughter covenanted, by some act *inter vivos* or by will, to leave his daughter a certain provision: no act *inter vivos* was done by the covenantor, nor did his will contain any provision for her: the daughter died in the lifetime of her father: the Court of Common Pleas, on a case stated for its opinion by direction of Sir James Wigram, V. C., held that the covenantee had no cause of action, on the ground, it appears, of the provision by will having failed by the death of his daughter, and a consequent exemption from liability to perform the other alternative. The vice-chancellor, though expressing an opinion that by this view the intention of the parties was disappointed, as the provision was intended to be absolute, and the mode of making *it only intended to be left to the [*300] discretion of the covenantor, yet confirmed the certificate, and dismissed the bill with costs.

§ 680. (3) Where one of the alternatives becomes impossible by the act or default of the party for whose benefit the contract is to be executed, the other alternative is discharged and need not be performed.^(l) Therefore in debt on an obligation conditioned for the delivery up by the defendant to the plaintiff of three obligations in which the plaintiff was bound to the defendant, or for the execution to the plaintiff of such release of them as should be devised by the plaintiff's counsel before Michaelmas, a plea that neither the plaintiff nor his counsel devised any release before Michaelmas was held good by a majority of the judges in the Queen's Bench, on the ground that where the obligee disables the obligor to perform the one part, the law discharges him from the other.^(m) This authority has since been followed by another case⁽ⁿ⁾ in the same court, in which in debt on a bond by the defendant conditioned to grant an annuity within six months after the death of A., and if he refused, on request then to pay £300: a plea that no grant had been tendered within six months was held good.

§ 681. (4) Where one alternative is prevented by the act of a stranger rendering its performance impossible, the other alternative must be performed. This was held in a case in the 4th of Henry VII.,^(o) which decided that if one be obliged to enfeoff me of certain lands, or to marry A. S. before such a day, and a stranger marry A. S. before the day, the obligor must make a feoffment of the lands: but otherwise, if the obligee married A. S. before the day, for then the other alternative is discharged.

vel illud stipulatus sit, tot obligationes sunt quot corpora; quare si altera res ex quacunque causâ dari non potest, altera nihilominus dabitur."—Warnkönig, Institut. Jur. Rom. Priv. lib. iii. c. 2, t. 1, § 793.

(k) 7 H. 267; S. C. 9 C. B. 1.

(l) Com. Dig. Condit. K. 2.

(m) *Grenningham v. Ewer*, Cro. Eliz. 396, 539.

(n) *Basket v. Basket*, 1 Mod. 265; 2 Mod. 200.

(o) Quoted in *Grenningham v. Ewer*, Cro. Eliz. 397.

*CHAPTER XXIII.

[*301]

OF THE RESCISSION OF THE CONTRACT.

§ 682. THE rescission of a contract necessarily constitutes a bar to the performance of it by either of the parties to it. A rescission may be affected either by a novation,—that is, the entering into a new contract, which takes the place of and puts an end to the original one,(p)—or by a mere agreement to rescind.

§ 683. Generally speaking, the parties to a contract, supposing them both to continue *sui juris* and capable of contracting, have a right to determine it by either of these modes, and they may do so even when the contract between them affects the interest of some third person; except, it seems, where there has been a part performance of it. So that where A. by deed agreed with B. that his (A.'s) son should reside with and be brought up by B., who covenanted to leave him certain property, and there was no appreciable part performance as regards the child, so that his condition in life had not been altered, and no expectation on his part was defeated, it was held that A. and B. might by agreement rescind the deed, though it would, it seems, have been different if there had been any part performance affecting the child.(q)

*§ 684. A novation by the intervention of a new person puts [*302] an entire end to the contract between the original parties, by establishing a contract between one of the original contractors and the new person. Thus where A. sold shares to B., and B. sold them to C., and A. executed a deed of transfer to C., which C. refused to register; A. brought a bill for specific performance against B., but it was held that A. having assigned the shares to C., he had determined the privity of contract with B., and that he could not make a title to the shares. The main question in the case was whether C. was merely the nominee of B., or there was a substantive contract between A. and C.: the latter was the view taken under the circumstances.(r)

§ 685. With regard to the rescission of an existing contract by a novation effected by the introduction of a new term, it is not every change in a term of the original agreement which will amount to such a substitution. Thus where there was an agreement for a lease, and a parol agreement was subsequently made for the reduction of the rent, which it was contended worked a rescission of the original contract, Lord St. Leonards said, “I should be sorry to hold that because a landlord abates the rent for a time or permanently, he therefore abandons the whole contract. . . . I should do a most mischievous thing were I to hold that a mere abatement of rent, which occurs every day, would alto-

(p) “*Novatio est prioris debiti in aliam obligationem aut civilem aut naturalem trans fusio et translatio: hoc est, cum ex precedenti causâ ita nova constituantur, ut prior perimitur.*”—Dig. lib. xlvi. t. 2, l. 1. See also Institut. lib. iii. tit. 30, s. 3.

(q) Hill v. Gomme, 1 Beav. 540; S. C. 5 My. & Cr. 250, ante, § 113.

(r) Shaw v. Fisher, 5 De G. M. & G. 596; Holden v. Hayn, 1 Mer. 47; Hall v. Laver, 3 Y. & C. Ex. 191; Stanley v. Chester and Birkenhead Railway Company, 9 Sim. 264; S. C. 3 My. & Cr. 773; ante, § 86.

gether put an end to the existing contract, and create a new tenancy from year to year. The abatement of the rent was rather a confirmation of the existing tenancy, with a relaxation of one of the terms of it.”^(s)

§ 686 So also, suggestions made by either party after contract, for [**303] the purpose of obviating any difficulties in the *completion of it, will not be taken to amount to a novation: so to hold would be to preclude parties from endeavouring to remove objections by concessions of any kind.^(t)

§ 687. As it is the existence of the new contract that works the extinction of the old, this new one must, of course, be a valid and binding agreement: so that, for instance, where a second agreement is alleged, but without consideration, the original agreement will remain intact, and may be executed without regard to the second.^(u)

§ 688. This makes it requisite to consider the evidence of the novation alleged. (1) Where the original contract is by parol, the new one may, of course, be by parol also.

§ 689. (2) Where the original agreement was in writing, though not by law required so to be, the new agreement may be evidenced in any way which establishes it according to the principles of the court. Thus an agreement, though under seal, may in a court of equity be waived by a course of conduct from whence the presumption of a new contract in substitution arises. “In ordinary partnerships,” said Lord Eldon, “nothing is more clear than this, that although partners enter into a written agreement, stating the terms upon which the joint concern is to be carried on, yet if there be a long course of dealing, or a course of dealing not long, but still so long as to demonstrate that they have all agreed to change the terms of the original written agreement, they may be held to have changed these terms by conduct.”^(v) And accordingly, in another case,^(w) where an agreement for a partnership was decreed to be specifically executed, the court directed an inquiry, whether any and what variations had been made in the original agreement by the consent [**304] of the partners, *and directed the deed to be settled by the master having regard to such variations.

§ 690. (3) Where the original contract is by law required to be in writing, the new one must be in writing also; so that, for instance, where the relation of landlord and tenant is constituted by writing, an agreement for an abatement of rent must be in writing also.^(x) From the principles of the court, however in regard to part performance, an exception naturally arises, as the new contract may in this, as in any other case, be by parol, if supported by acts of part performance. Thus, for example, where W. leased to N. a house for eleven years, and was to allow £20 for repairs, and this agreement was signed and sealed by the parties, and N. finding that the repairs of the house would cost more than £20, laid out a further sum, in

(s) *Clarke v. Moore*, 1 Jon. & Lat. 723, particularly 728, 729.

(t) *Monro v. Taylor*, 8 Ha. 51, particularly 61.

(u) *Robson v. Collins*, 7 Ves. 130.

(v) *Const v. Harris*, T. & R. 496, 523; *Geddes v. Wallace*, 2 Bli. 270, 297; *Jackson v. Sedgwick*, 1 Sw. 460; per Lord Langdale in *Smith v. Jeyes*, 4 Beav. 505.

(w) *England v. Curling*, 8 Beav. 129.

(x) *O'Connor v. Spaight*, 1 Sch. & Lef. 305.

consequence of W.'s having promised to enlarge the term, but without mentioning for what term : Sir Joseph Jekyll carried the parol agreement into effect, on the ground that it was a new agreement, and that the laying out the money was a part performance on the one part, which made it needful to execute the parol agreement on the other.(y)

§ 691. The contract may, as we have already seen, be determined by a simple agreement to rescind it.

§ 692. Independently of the Statute of Frauds, the rule of law does not allow the variation of an agreement that has been reduced to writing to be evidenced by parol; but it allows parol evidence of matters collateral to the contract. Thus, for instance, it may be shown by parol evidence that a document purporting to be an agreement was signed conditionally, and so only in the nature of an escrow,—the question thus decided being dehors the writing :(z) and so, *too, rescission or waiver being in [*305] its nature subsequent and collateral to the agreement, may be proved by parol testimony.(a)

§ 693. How far this principle ought to have been affected by the Statute of Frauds is a question which has elicited opposing views ; on the one hand, it has been said that the statute provides that no action shall be brought on any contract of the descriptions there specified except it be in writing, but does not provide that every such written contract shall support an action : on the other side, it has been argued that an agreement to waive a purchase of land is as much an agreement concerning lands as the original contract.(b) However, it is perfectly well ascertained that a contract in writing, and by law required to be in writing, may in equity be rescinded by parol ;(c) and waiver by parol therefore furnishes a sufficient answer to a bill for specific performance.(d)

§ 694. Even where the original agreement is under seal, it may be rescinded in equity by a parol agreement evidenced only by conduct.(e)

§ 695. How far such a parol waiver is a good defence at law appears still undetermined.(f)

§ 696. But the parol agreement thus to rescind one in writing, must amount to a total abandonment of the whole contract, and not to a partial waiver of some of its terms ; for to allow of such a proceeding would be to have a contract *proved partly by writing, and partly by parol ;(g) it would be a parol novation of a written [*306] agreement, which we have already seen to be inadmissible where the

(y) 5 Vin. Abr. 522, pl. 38.

(z) Pym v. Campbell, 6 Ell. & Bl. 370.

(a) Davis v. Symonds, 1 Cox, 402, 406. This seems denied as to waiver at law by Lord Hardwicke, in Bell v. Howard, 9 Mod. 305.

(b) Per Lord Hardwicke, in Buckhouse v. Crosby, 2 Eq. Cas. Abr. 33.

(c) Goman v. Salisbury, 1 Vern. 240; Inge v. Lippingwell, 2 Dick. 469; S. C. 5 Vin. Abr. 516, pl. 22; per Grant, M. R., in Ex parte Lord Ilchester, 7 Ves. 377. See also Backhouse v. Mohun, 3 Sw. 434, n.; Buckhouse v. Crosby, 2 Eq. Cas. Abr. 32, pl. 44.

(d) Davis v. Symonds, 1 Cox, 402; Robinson v. Page, 3 Russ. 114.

(e) Hill v. Gomme, 1 Beav. 540. See also Lady Lanesborough v. Ockshott, 1 Bro. P. C. 151.

(f) Goss v. Lord Nugent, 5 B. & Ad. 58; Harvey v. Grabham, 5 A. & E. 61.

(g) Goss v. Lord Nugent, 5 B. & Ad. 58.

law requires the agreement to be evidenced by writing :^(h) and therefore the agreement, or the circumstances from which it is inferred, must show an absolute dissolution and abandonment of the contract.⁽ⁱ⁾

§ 697. Any circumstances or course of conduct from whence can be clearly deduced an agreement to put an end to the original contract, will amount to a rescission of it. Thus, to give one or two examples : where on default in payment of the purchase-money one party said to the other that there must be an end of the negotiation, and the other assented ; the contract was held to have been rescinded.^(k) And where the vendor was allowed for a long period to remain in possession, and the purchaser's representatives seventeen years afterwards treated themselves in a deed between the parties as entitled to interest on the debt which had been the consideration for the sale and not to the rents and profits of the land, the contract was held to have been waived.^(l)

§ 698. But the court must be satisfied of this total abandonment by both parties of the contract. "The court," said Lord St. Leonards, "requires as clear evidence of the waiver as of the existence of the contract itself, and will not act upon less."^(m) And in another case, his lordship said that unless a party has by his conduct forfeited his right, "abandonment of a contract, according to the law of this court, is a contract in itself;" and accordingly *he refused to hold a loose [*307] conversation which was alleged as a waiver of a contract for a lease, to amount to such a new contract.⁽ⁿ⁾

§ 699. It is to be borne in mind that the conduct of one party, which may debar him from insisting on a contract, may yet not prevent its being enforced against him or amount to a rescission of it :^(o) and further, that there are many cases in which there has been such a departure in conduct from the agreement between the parties, that the court will refuse to execute the agreement, though the effect of that conduct may not have been to substitute a valid contract for the old one, or absolutely to rescind the old one for all purposes.^(p)

§ 700. It is common to introduce into contracts stipulations for their avoidance or rescission on the happening of certain specified events. It will be desirable briefly to consider these stipulations.

§ 701. When a contract stipulates that on the happening of a certain event it shall be void, the construction put upon it by the courts generally is, that it may on this event be rescinded by the party injured by such event. Thus, a proviso that in case the vendor of an estate cannot deduce a good title, or the purchaser shall not pay the money at the appointed day, the contract shall be void, has been held to mean that in

(h) *Ante*, § 690.

(i) *Price v. Dyer*, 17 Ves. 356; *Robinson v. Page*, 3 Russ. 114; Lord Thurlow seems to have thought that a part might be rescinded by parol, in *Jordan v. Sawkins*, 1 Ves. Jun. 404.

(k) *Carter v. Dean of Ely*, 7 Sim. 211.

(l) *Earl of Rosse v. Sterling*, 4 Dow. 442. See also *Hill v. Gomme*, 1 Beav. 540.

(m) *Carolan v. Brabazon*, 3 Jon. & Lat. 200, 209.

(n) *Moore v. Crofton*, 3 Jon. & Lat. 438, 445.

(o) *Price v. Assheton*, 1 Y. & C. Ex. 82.

(p) An example of this seems afforded by the case of the Paris Chocolate Company v. Crystal Palace Company, 3 Sm. & Gif. 119.

the former case the purchaser, and in the latter the vendor, may avoid the contract, and not that the contract is utterly void.(q)

§ 702. A right to rescind an agreement on the non-performance of an act, which act it is the duty of the party invested with the right of rescission to perform if he can, will *not give such party a right [*308] to refuse to perform his part of the agreement, but will be held to apply where the act cannot be done: thus, where there is a condition that if any objection shall not be removed within a limited time, the vendor shall be at liberty to annul the contract, the vendor is not entitled to neglect to remove any objection, and then, on the strength of his own neglect, to annul the contract; but the condition will entitle him to rescind the contract if, having done all that is incumbent on him, he fail to show a good title.(r) But where the right to rescind is limited to arise in case of his being unable or unwilling to do the act, the case is of course different, and he is exempted at his election from any obligation to do the act.(s)

§ 703. The right to rescind a contract must be exercised so soon as any one of the events which give rise to the right happens, or is known to the person entitled to it. Thus in the case of a transaction grounded on fraud, the party deceived must, on the discovery of the fraud, elect to rescind or to treat the transaction as a contract.(t) And so where conditions of sale stipulated that if there was any objection which the vendor should be unable or unwilling to remove he might rescind the contract, and the purchaser should be entitled to his deposit without interest or costs, it has been held that such a condition is confined to the objections first taken after the abstract is delivered, and that a treaty between the parties for the completion of the purchase is a waiver of the condition,(u) it being, of course, evidence of the vendor's willingness to remove the objection. Such a condition will apply, if it be acted on by the vendor the moment the defect is known to him, but will not allow him to spend time in fruitless efforts to remove the objection, and then to rescind the contract on the terms of *the condition.(v) And [*309] so where money is payable by instalments, and there is a power to rescind on breach of the contract, this must be taken advantage of at once, and the receipt of money due on a subsequent instalment is a waiver of the right to rescind for default in respect of a previous one.(w)

§ 704. Nor will the right to rescind revive merely because of the subsequent discovery of some incident of the fraud, or other ground on which the right arises, which was not known at the time of waiver: so where in a transaction based on fraud, the purchaser did not immediately on the discovery of the fraud repudiate the contract, but on the discovery of

(q) Roberts v. Wyatt, 2 Taunt, 268. See also Doe d. Nash v. Birch, 1 M. & W. 402; Hyde v. Watts, 12 M. & W. 254.

(r) Page v. Adams, 4 Beav. 269.

(s) Tanner v. Smith, 10 Sim. 410; Morley v. Cook, 2 Ha. 106, and see next ?.

(t) Campbell v. Fleming, 1 A. & E. 40.

(u) Tanner v. Smith, 10 Sim. 410; Morley v. Cook, 2 Ha. 106. See also Cutts v. Thodey, 13 Sim. 206.

(v) McCulloch v. Gregory, 1 K. & J. 286; Lane v. Debenham, 17 Jur. 1005.

(w) Hunter v. Daniel, 4 Ha. 420.

a further circumstance of fraud sought to do so, he was held incapable then of rescinding the contract.(x) "To entitle him to do so," said Mr. Justice Patteson in that case, "he should, at the time of discovering the fraud, have elected to repudiate the whole transaction. Instead of doing so, he deals with that for which he now says that he never legally contracted. Long after this, as he alleges, he discovers a new incident in the fraud. This can only be considered as strengthening the evidence of the original fraud; and it cannot revive the right of repudiation which has been once waived."

§ 705. But where the contract stipulates for a right of rescission in respect of separate breaches, the waiver of one will not waive another: so that where there was an agreement for the payment of money by instalments, and that time should be of the essence, and further, a power to rescind on breach of the contract, it was held that each default of payment of an instalment at the stipulated time was a fresh breach of the contract, on which the right to rescind arose.(y)

[*310] *§ 706. Where there are conditions for compensation and for rescission, the courts will, for obvious reasons, generally construe them so as to confine the right to rescind to cases not within the condition for compensation. Thus, in a case in which particulars of sale by error, but without fraud or gross negligence on the part of the vendor, described part of the property as a customary leasehold holden of a manor renewable every twenty-one years on payment of a customary fine, and the property was in fact holden only for a term of twenty-one years with no customary right of renewal; the fourth condition of sale, after providing for the delivery of the abstract and of objections to the title, stipulated that the vendor should be at liberty at any time after the delivery of such objections to vacate the sale, and that the deposit was thereupon to be returned without interest, costs, or other compensation; the fifth condition of sale provided that the purchaser should accept the existing lease and the assignment to the vendor as a sufficient title to this property; and the sixth condition stipulated that if through any mistake the estate should be improperly described or any error or mis-statement be inserted in the particular, the same should not vitiate the sale, but that compensation should be made by either party, as the case might be: the purchaser filed a bill for specific performance with compensation, contending that the error was within the sixth condition: the vendor resisted performance and sought to vacate the contract, on the ground that it was within the fourth condition. Vice-Chancellor Page Wood, referring to the fifth condition as explaining the use of the word title in the condition, held that this was rather a mis-statement of the subject-matter of the sale than of the vendor's title to it, and therefore within the sixth and not within the fourth condition of sale; and accordingly, enforced specific performance with compensation :(z) and the master of the *rolls [**311] put a like construction on similar conditions in a similar case.(a)

§ 707. It remains to remark that the plaintiff filing a bill for the spe-

(x) *Campbell v. Fleming*, 1 A. & E. 40.

(y) *Hunter v. Daniel*, 4 Hl. 420.

(z) *Painter v. Newby*, 11 Hl. 26; *Nelthorpe v. Holgate*, 1 Coll. 203.

(a) *Hoy v. Smythies*, 22 Beav. 510.

cific performance of a contract, may pray in the alternative that, if the contract cannot be enforced, it may be rescinded and delivered up to be cancelled.(b) When the bill is by the vendor, and the purchaser has been in possession, this alternative prayer may embrace an account of the rents and profits.(c)

*CHAPTER XXIV.

[*312]

OF THE LAPSE OF TIME.

§ 708. THE expiration of time after the contract has been entered into, and before the application to the court for its interference, or the fact that the plaintiff has not performed his part of the contract at the time specified, may furnish grounds of defence to suits for specific performance.

§ 709. At law the plaintiff must show that all those things which are on his part to be performed, have been performed within a reasonable time, or where time is specified by the contract, within the time so specified; and at law time is thus always of the essence of the contract.(a) But in equity the question of time is differently regarded: for a court of equity discriminates between those terms of the contract which are formal and a breach of which it would be inequitable in either party to insist on as a bar to the other's rights, and those which are of the substance and essence of the agreement:(b) and, applying to contracts those principles which have governed its interference in relation to mortgages,(cc) it has held time to be *prima facie* non-essential, *and has accordingly [*313] granted specific performance of agreements after the time for their performance has been suffered to pass by the party asking for the intervention of the court, if the other party has not shown a determination not to proceed.(d) There are, however, many cases in which it proves a bar to relief, and these we may now proceed to consider under three heads, viz. (1) those cases where time was originally of the essence of the contract, (2) where though not so, it was engrafted into it by sub-

(b) Moseley v. Virgin, 3 Ves. 184; Costigan v. Hastler, 2 Sch. & Lef. 160, 166; Stapylton v. Scott, 13 Ves. 425; Clarke v. Faux, 3 Russ. 320; King v. King, 1 My. & K. 442; Douglass v. London and Northwestern Railway Company, 3 K. & J. 173.

(c) Williams v. Shaw, 3 Russ. 178, n.

(a) Berry v. Young, 2 Esp. 640, n.; Wilde v. Fort, 4 Taunt. 334; Stowell v. Robinson, 3 Bing. N. C. 928; Alexander v. Godwin, 1 Bing. N. C. 671. Where a condition as to time is a mutual stipulation and not a condition precedent, the lapse of time is of course no bar to an action on the contract. Hall v. Cazenove, 4 East, 477; Havelock v. Geddes, 10 East, 555; Borneman v. Tooke, 1 Camp. 377; Lucas v. Godwin, 3 Bing. N. C. 737; Lamprell v. Bellericay Union, 3 Ex. 283.

(bb) Parkin v. Thorold, 16 Beav. 59.

(cc) See per Lord Eldon in Seton v. Slade, 7 Ves. 273.

(d) Pineke v. Curteis, 4 Bro. C. C. 329; Radcliffe v. Warrington, 12 Ves. 326. See the discussion of this doctrine by Lord Cranworth and Sir J. Romilly, in Parkin v. Thorold, 2 Sim. N. S. 1; S. C. 16 Beav. 59.

sequent notice, and (3) those cases where the delay has been so great as to constitute *laches* disentitling the party to the aid of the court, and evidencing an abandonment of the contract irrespectively of any peculiar stipulations as to time.

§ 710. (1) Time is originally of the essence of the contract in the view of a court of equity, whenever it appears to have been part of the real intention of the parties that it should be so, and not to have been inserted as a merely formal part of the contract.(e) As this intention may either be separately expressed, or may be implied from the nature or structure of the agreement, it follows that time may be originally of the essence of a contract as to any one or more of its terms, either by virtue of an express condition in the agreement itself making it so, or by reason of its being implied. It will be convenient to consider the cases separately; premising, however, that the point that time is of the essence of the contract is one which should be made by the party insisting on it without delay.(f)

§ 711. The court seems at one time to have gone so far in its disregard of time as to consider that it was of no consequence in equity:(g) [*314] and accordingly, Lord Thurlow(h) *seems to have maintained that no expression in the agreement could make time of the original essence of the contract. Lord Kenyon, however, maintained the contrary :(i) Lord Thurlow's doctrine was doubted by Lord Eldon :(k) and accordingly, express stipulations rendering time of the essence have been maintained as valid and binding as much in equity as at law,(l) and in respect of covenants for the renewal of leases as well as of contracts for sale.(m)

§ 712. In order to render time thus essential, it must be clearly and expressly stipulated that it shall be so: it is not enough that a time is mentioned during which or before which something shall be done. Therefore, where a day for payment had been inserted, it was held not to be thereby rendered essential :(n) where a day was specified for the delivery of the abstract it was equally non-essential, although the purchaser upon its expiration immediately refused to proceed :(o) and in a case where a day had been specified for the completion of the contract, the master of the rolls(p) held it to be non-essential, though in so doing he differed from the previous observations of Lord Cranworth, then a vice-chancellor, made in the same case at an earlier stage.(q)

§ 713. Time may be implied as essential in a contract, from the nature of the subject-matter with which the parties are dealing. "If, therefore,"

(e) *Hipwell v. Knight*, 1 Y. & C. Ex. 401.

(f) *Mouro v. Taylor*, 8 Ha. 51, 62.

(g) *Gibson v. Patterson*, 1 Atky. 12, which has been thought an erroneous report. See *Lloyd v. Collett*, 4 Bro. C. C. 469, n. (3).

(h) *Gregson v. Riddle*, cited by Romilly, arg. 7 Ves. 268.

(i) *Mackreth v. Marlar*, 1 Cox, 259. (k) In *Seton v. Slade*, 7 Ves. 270.

(l) *Hudson v. Bartram*, 3 Mad. 440; *Lloyd v. Rippingale*, cited 1 Y. & C. Ex. 410. See also *Honeyman v. Marryatt*, 21 Beav. 14, 24.

(m) *Baynham v. Guy's Hospital*, 3 Ves. 295.

(n) *Hearne v. Tenant*, 13 Ves. 287.

(o) *Roberts v. Berry*, 16 Beav. 31, affirmed 3 De G. M. & G. 284.

(p) *Parkin v. Thorold*, 16 Beav. 59. (q) S. C. 2 Sim. N. S. 1.

said Mr. Baron Alderson,(r) "the thing sold be of greater or less value according *to the effluxion of time, it is manifest that time is of [*_315] the essence of the contract: and a stipulation as to time must then be literally complied with in equity as well as in law." In respect of reversionary interests, therefore, it is held to be of the essence of justice, that contracts for sale should be executed immediately and without any delay.(s)

§ 714. So, again, where the subject-matter is from its nature exposed to daily variation, the court inclines to hold time to be material, as in the sale of the stock in a public-house,(t) in contracts for annuities on lives,(u) and in purchases of government stock.(v)

§ 715. And so, again, where the object of the contract is a commercial enterprise, the court is strongly inclined to hold time to be essential, whether the contract be for the purchase of land for such purposes, or more directly for the prosecution of trade:(w) the court has acted on this principle in a contract respecting land which had been purchased for the erection of mills,(x) and in another contract for the sale of a public-house in Camden Town.(y)

§ 716. This principle applies with especial force to contracts relating to mines. The nature of all mining transactions is such as to render time essential; for no science, foresight, or examination can afford a sure guarantee against sudden losses, disappointments, and reverses, and a person claiming an interest in such undertakings ought therefore to show himself in good time willing to partake in the possible loss as well as profit.(z) So in several cases it has been held of the essence in contracts for the *sale of mines and works:(a) and in a recent case [*_316] a delay of three years and a half before taking any step to enforce specific performance of an agreement to take certain coal mines was held a bar to relief.(b)

§ 717. Again, where the contract had relation to the supply of coal, and eleven months were allowed to elapse before filing the bill, the article being one fluctuating from day to day in its market price, the court held the delay a ground for declining its interference:(c) and where the contract contemplated the payment of moneys to be applied towards obtaining patents, time was from the nature of the object in view held to be of the essence.(d)

(r) In Hipwell v. Knight, 1 Y. & C. Ex. 416.

(s) Newman v. Rogers, 4 Bro. C. C. 391; Carter v. Dean of Ely, 7 Sim. 211.

(t) Coslacke v. Till, 1 Russ. 376. (u) Withy v. Cottle, T. & R. 78.

(v) Doloret v. Rothschild, 1 S. & S. 590. See also Lewis v. Lord Lechmere, 10 Mod. 503.

(w) Walker v. Jeffreys, 1 Ha. 341. (x) Wright v. Howard, 1 S. & S. 190.

(y) Seaton v. Mapp, 2 Coll. C. C. 556, where the essentiality of time was arrived at from the conditions as well as from the subject-matter.

(z) Per K. Bruce, L. J., in Prendergast v. Turton, 1 Y. & C. C. C. 110, and in Clegg v. Edmondson, 26 L. J. Ch. 681.

(a) Parker v. Frith, 1 S. & S. 199, n.; per Lord Eldon in City of London v. Mitford, 14 Ves. 58.

(b) Eads v. Williams, 4 De G. M. & G. 674; Clegg v. Edmondson, 26 L. J. Ch. 673, (L. J.)

(c) Pollard v. Clayton, 1 K. & J. 462; per Lord Redesdale in Crofton v. Ormsby, 2 Sch. & Lef. 604. (d) Payne v. Banner, 15 L. J. Ch. 227.

§ 718. So, again, where a contract specified a time by which calls were to be paid up, or in default the shares were to be forfeited ;(e) and where a contract gave an option to be exercised before a certain time, to convert loan notes into shares :(f) in both these cases time was from the nature of the subject-matter of the contract held to be essential. The case of *Macbryde v. Weekes*(g) is a strong illustration of this principle ; for there the plaintiff by the contract undertook to purchase a field adjoining his own, to procure an assignment of a term, and to do other things which usually require time : but the nature of the subject-matter of the contract, which was a colliery, was held to make time of the essence of the contract, to the extent of rendering it incumbent on the vendor to use his utmost diligence in completing the contract, and give the purchaser a right to decline completing, if the vendor failed to do so.

*§ 719. Where hardship would result from considering time [³¹⁷] immaterial, as where delay in completion would involve one of the parties in a serious liability or loss, the court will incline to consider time as being of the essence. Thus where a tenant, without any definite interest, agreed for the sale of his goodwill and business to a purchaser to be completed on the 25th of March, that day was considered essential, inasmuch as if the contract were not then completed, the vendor might render himself liable as tenant for the ensuing year.(h) And so, again, where the body to participate in the purchase-money being a chapter, was liable to variation, non-payment of the consideration money at the specified time was held fatal to the subsistence of the contract.(i)

§ 720. Where the vendor stipulates that time shall be of the essence in respect of some of the conditions in his favour, the court inclines to hold it essential in respect of others also against him. Vendors so stipulating for the essentiality of time in their favour, "cannot fairly," said Vice-Chancellor Knight Bruce, "complain of being held strictly to the conditions themselves. . . . The plaintiffs' proposition is that the purchaser shall be held by a cable, and the vendors by a skein of silk."(k)

§ 721. And where the contract contains stipulations in favour of one party and not of the other,—as, for instance, an option,—or is in anywise unilateral, the court, if it does not consider time as originally of the essence, will, as we shall hereafter see, look at it with more than usual strictness.(l)

§ 722. (2) Where time is not originally of the essence of the contract, and any unnecessary delay is caused by one party, the other party has a [³¹⁸] right to limit a reasonable *time within which the contract shall be perfected by the other, in default of obedience to which the court will not enforce specific performance, but will leave the parties to their legal rights.(m)

(e) *Sparks v. Liverpool Water-works Company*, 13 Ves. 428.

(f) *Campbell v. London and Brighton Railway Company*, 5 Ha. 519.

(g) 22 Beav. 533.

(h) *Coslake v. Till*, 1 Russ. 376.

(i) *Carter v. Dean of Ely*, 7 Sim. 211.

(k) *Seaton v. Mapp*, 2 Coll. C. C. 556, 564.

(l) See post, § 733.

(m) *Taylor v. Brown*, 2 Beav. 180; *Benson v. Lamb*, 9 Beav. 502; *Nokes v. Lord Kilmorey*, 1 De G. & Sm. 444.

§ 723. This principle is of somewhat recent introduction : in a case⁽ⁿ⁾ before Sir John Leach in 1821, he did not consider it to be then decided that time could thus be made essential by subsequent notice ; and where clear notice had been given that a purchaser would insist on completion by the time specified, Lord Erskine had previously refused to consider time as of moment in the contract.^(o) But this beneficial principle is now well established.

§ 724. It is not, of course, possible for either party arbitrarily and suddenly to put an end to negotiations as to title,^(p) or other matters pending between the parties. The time specified by the notice must be long enough for the proper doing of the things required to be done,^(q) and if it be not so, the notice will fail in engraving time into the essence of the contract. Thus, in one case,^(r) six weeks being a less time than the vendor took to furnish the abstract, was held to be an unreasonably short time for the vendor to insist on the purchaser's completing, and the notice was therefore inoperative ; and in another case, fourteen days was held not to be a reasonable time within which to require the plaintiffs to produce a deed and complete the title.^(s)

§ 725. But where a vendor has previously refused to remove an objection, a time which would be unreasonably short in the first instance for the removal of it may then become a reasonable period, after which the purchaser may treat the contract as rescinded.^(t)

*§ 726. Again, where a notice to rescind was waived in case evidence requisite to prove the title was produced immediately : [*319] the evidence not having been produced, the bill was dismissed.^(u)

§ 727. And the nature of the contract rendering expedition obligatory, may make reasonable a notice which would otherwise be too short. Thus, where A. agreed to grant B. a mining lease, and for that purpose undertook to buy a field adjoining his own, to procure an assignment of a term, and do other acts requiring time, and nine weeks elapsed from the contract without any communication from A. to B. to show when the contract was likely to be completed, and B. then gave A. notice to complete within one calendar month, and in default to rescind the contract : it was held that the nature of the subject-matter of the contract rendered expedition on the part of the lessor essential, and that the month's notice was reasonable.^(v)

§ 728. The notice to be given thus to engrave time into the contract must be express, distinct, and unequivocal : thus, a notice that one party would consider the non-performance by a certain day as equivalent to a refusal to perform the contract, was held not to amount to a notice that the contract would then be considered as rescinded.^(w)

§ 729. Where the engrafted time is set up as a defence, it does not appear to be necessary that the notice should have been in writing ; so that for this purpose statements made by the purchaser's agent at the

(n) Reynolds v. Nelson, 6 Mad. 18. (o) Radcliffe v. Warrington, 12 Ves. 326.

(p) Taylor v. Brown, *ubi sup.* (q) King v. Wilson, 6 Beav. 124.

(r) Pegg v. Wisden, 16 Beav. 239. (s) Parkin v. Thorold, 16 Beav. 59.

(t) Nott v. Riccard, 22 Beav. 307.

(u) Stewart v. Smith, V. C. 16 Dec. 1824; 6 Ha. 222, n.

(v) Macbryde v. Weekes, 22 Beav. 533. (w) Reynolds v. Nelson, 6 Mad. 18.

time of signing the contract, to the effect that time was essential, have been admitted as evidence; though it seems that such verbal notice would be inadmissible on behalf of the plaintiff.^(x)

[*320] § 730. (3) The court of chancery was at one time inclined to neglect all consideration of time in the specific performance of contracts for sale, not only as an original ingredient in them, but as affecting them by way of *laches*.^(y) But it is now clearly established, that the delay of either party in not performing its terms on his part, or in not prosecuting his right to the interference of the court by the filing of a bill, or, lastly, in not diligently prosecuting his suit when instituted,^(z) may constitute such *laches* as will disentitle him to the aid of the court, and so amount, for the purpose of specific performance, to an abandonment on his part of the contract.

§ 731. One of the earliest cases tending to establish this principle was Mackreth v. Marlar,^(a) before Lord Kenyon: Lord Loughborough followed it, and held in one case where a vendor delivered no abstract on or before the day for completion, nor till after an action for the deposit, and the purchaser had demanded back his deposit at the date for completion, that there was evidence of an abandonment of the contract by the vendor.^(b) These cases were approved by Lord Alvanley:^(c) and finally, the doctrine in question was adopted and acted on by Lord Eldon: thus, for example, in one instance he on this ground discharged a purchaser under a decree, error having been shown in the decree, though the parties were proceeding to rectify it.^(d)

§ 732. The doctrine of the court thus established, therefore, is that *laches* on the part of the plaintiff, either in executing his part of the contract or in applying to the court, will debar him from relief. "A party cannot call upon a court of equity for specific performance," said Lord Alvanley,^(e) "unless he has shown himself ready, desirous, [*321] *prompt, and eager;" or, to use the language of Lord Cranworth,^(f) "specific performance is relief which this court will not give, unless in cases where the parties seeking it come as promptly as the nature of the case will permit."^(g)

§ 733. Where the contract is in anywise unilateral, as for instance, in the case of an option to purchase, a right of renewal, or of any other condition in favour of one party and not of the other, then any delay in the party in whose favour the contract is binding is looked at with especial strictness.^(h) On this principle, the delay of a purchaser in

(x) Nokes v. Lord Kilmorey, 1 De G. & Sm. 444, particularly 458.

(y) See ante, § 711.

(z) Moore v. Blake, 1 Ball & B. 62.

(a) 1 Cox, 259.

(b) Lloyd v. Collett, 4 Bro. C. C. 469; Harrington v. Wheeler, 4 Ves. 636.

(c) Fordyce v. Ford, 4 Bro. C. C. 494.

(d) Lechmere v. Brazier, 2 J. & W. 287; Coster v. Turner, 1 Russ. & My. 311.

See also Cubitt v. Blake, 19 Beav. 454.

(e) In Milward v. Earl Thanet, 5 Ves. 720, n.

(f) In Eads v. Williams, 4 De G. M. & G. 691.

(g) See also Alley v. Deschamps, 13 Ves. 225; Williams v. Williams, 17 Beav. 213; Firth v. Greenwood, 1 Jur. N. S. 866, (Wood, V. C.)

(h) Allen v. Hilton, 1 Fonbl. Eq. 432; Brooke v. Garrod, 27 L. J. Ch. 226, (Wood, V. C.)

deciding whether he will or will not accept the title is an injustice, because the purchaser can enforce the contract against the vendor whether the title be good or bad, whereas the vendor can only do so in case of a good title.(i)

§ 734. Acquiescence in the breach of a covenant will form a bar to its specific performance in equity.(k)

§ 735. In many of the cases there has been a general dilatoriness in all the proceedings, so that it is almost impossible to state briefly the actual amount of delay which has been considered to bar the plaintiff's right to relief: but some notion of the present doctrine of the court on this point will be gained from the following cases.

§ 736. In the old case of the Marquis of Hertford v. Boore,(l) a delay of fourteen months was not considered a bar to the plaintiff's bill. But in the recent case of Eads v. Williams,(m) a delay of three and a half years was considered fatal: in Southeomb v. The Bishop of Exeter,(n) a delay from the 17th of January, 1842, to the 30th of August, *1843, [*322] was held to have the same effect: and in Lord James Stuart v. The London and Northwestern Railway Company,(o) Lord Justice Knight Bruce seemed to think that a delay from October, 1848, to July, 1850, must be fatal to such a bill.

§ 737. And where one party to the contract has given notice to the other that he will not perform it, acquiescence in this by the other party, by a comparatively brief delay in enforcing his right, will be a bar: so that in one case(p) two years' delay in filing a bill after such notice, and in another case(q) one year's like delay, have been held to exclude the intervention of the court.

§ 738. Where the contract is substantially executed, and the plaintiff is in possession of the property, and has got the equitable estate, so that the object of his suit is only to clothe himself with the legal estate, time either will not run at all as *laches* to debar the plaintiff from his right, or it will be looked at less narrowly by the court;(r) for the plaintiff has not been sleeping on his rights, but relying on his equitable title, without thinking it necessary to have his legal right perfected. Therefore, where a tenant holds under an agreement for a lease, pays his rent, has possession of the property, and the enjoyment of all the benefits given him by the contract, the effluxion of time will not be a ground for resisting its enforcement:(s) and so, again, where there was an agreement for the lease of a shop and the sale of the stock, and the stock had been paid for, the plaintiff had been put into possession as lessee, and the rent had been *paid,—in fact, everything had been done but the execution [*323] of the lease, which the defendant had refused to execute on a

(i) Spurrier v. Hancock, 4 Ves. 667.

(k) Barret v. Blagrave, 6 Ves. 104.

(l) 5 Ves. 719.

(m) 4 De G. M. & G. 674.

(n) 6 Ha. 213.

(o) 1 De G. M. & G. 721; and see also Spurrier v. Hancock, 4 Ves. 667; Harrington v. Wheeler, 4 Ves. 686; Guest v. Homfray, 5 Ves. 818; Thomas v. Blackman, 1 Coll. C. C. 301, 313.

(p) Heaphy v. Hill, 2 S. & S. 29.

(q) Watson v. Reid, 1 R. & My. 236. See also per M. R. in Parkin v. Thorold, 16 Beav. 73.

(r) Per Lord Redesdale in Crofton v. Ormsby, 2 Sch. & Lef. 604.

(s) Clarke v. Moore, 1 Jon. & L. 723; Sharp v. Milligan, 22 Beav. 606, affirmed by Lords Justices.

ground which was untenable,—specific performance of the lease was granted, notwithstanding considerable *laches* on the part of the plaintiff subsequent to the defendant's refusal, but therefore without costs.(t)

§ 739. Nor will time run as *laches* pending a negotiation between the parties to the contract, even though it may be carried on without prejudice to a notice given by one party that he holds the contract rescinded.(u) But where the negotiation is about a point which is not the real cause of the delay, its pendency will not prevent the effluxion of time operating as *laches*: so where there were two purchases, and disputes arose about the title and a valuation incident to the purchase, but from the evidence it appeared that want of means in the purchaser who had instituted the suit, and not these disputes, was the real cause of delay, the Vice-Chancellor Knight Bruce, though after some hesitation, refused specific performance, as the plaintiff in such suits must have more than a doubtful title.(v)

§ 740. When the delay arises from an untenable objection taken by one party, that party cannot avail himself of the delay caused by it, as a ground for the non-performance of the contract.(w) And generally, whenever the delay is attributable to the defendant, he will not be allowed to avail himself of it as a defence.(x)

§ 741. The fact that the purchaser has allowed the deposit to remain in the hands of the vendor from the time [*he held the contract [*324]] to be rescinded until the filing of the bill, has been decided not to affect the question of *laches*.(y)

§ 742. And so also continuing in possession, if under an arrangement to that effect, will not affect the question.(z)

§ 743. In a recent case,(a) Sir John Romilly was of opinion that time does not run as *laches* in the case of land taken under a railway act, until the time during which the company had the power to make the railway ceased, as the fact whether the company would require the land or not could not be ascertained until that time; but this view was not adopted by the lords justices, who seem to have thought that time would run from the date of the contract.

§ 744. It is to be observed that a mere claim by words though continual, unaccompanied by any act to give effect to them, will not prevent time operating as *laches* against the party making the claim, nor keep alive a right which would otherwise be precluded.(b)

§ 745. Objections grounded on the lapse of time are waived by a

(t) Burke v. Smyth, 3 Jon. & L. 193. See also per Lord St. Leonards in Ridgway v. Wharton, 6 H. Lords, 292.

(u) Southcomb v. Bishop of Exeter, 6 Ha. 213.

(v) Gee v. Pearse, 2 De G. & S. 325.

(w) Monro v. Taylor, 3 M'N. & G. 713, 723.

(x) Morse v. Merest, 6 Mad. 26; Shrewsbury and Birmingham Railway Company v. London and Northwestern Railway Company, 2 M'N. & G. 324, 355; per Lord St. Leonards in Ridgway v. Wharton, 6 H. Lords, 292.

(y) Watson v. Reid, 1 R. & My. 236; Southcomb v. Bishop of Exeter, 6 Ha. 213.

(z) Southcomb v. Bishop of Exeter, *ubi sup.*

(a) Lord James Stuart v. London and Northwestern Railway Company, 15 Beav. 513; S. C. 1 De G. M. & G. 721.

(b) Clegg v. Edmondson, 26 L. J. Ch. 673.

course of conduct inconsistent with the intention of insisting on such an objection : and in this respect it is immaterial whether time were originally of the essence or subsequently engrafted on the contract.(c)

§ 746. Therefore, where a title is in a state which may cause delay, and the purchaser goes on dealing about the title after the day for completion, this will waive his right to insist on the time.(d) So the examination of the abstract after the time will prevent a defendant insisting on time as essential, for he had no right to look into the abstract *if he meant to abandon his purchase.(e) And such conduct [*325] will amount to a waiver, even though a formal notice to abandon the contract may have been given.(f) So again, insisting on the contract after the time limited for completion,(g) and writing a letter extending the time for completion of the contract,(h) are acts respectively waiving the right to insist on that time as essential. But where a purchaser protests against delay, and then under protest deals about the title, this will not, it seems, amount to a waiver.(i)

§ 747. So as to time for payment : where an assignor of a lease insisted on a forfeiture of the assignment by reason of non-payment of part of the purchase-money at the time stipulated, he was held to have waived it by getting the assignee to pay the rent to the superior landlord, that not being consistent with the notion that the agreement was at an end :(k) in another case,(l) there was an agreement that, if the residue of the purchase-money was not paid at a certain day, the agreement should be void : it was not paid, but the vendor, allowing the purchaser to retain possession and taking from him a warrant of attorney to confess judgment in ejectment, was held to have waived the condition.

§ 748. As to the time for the delivery of objections, a subsequent correspondence as to title was in one case held to work a waiver :(m) and a similar result was in another case held to follow from the subsequent renewal of negotiation as to price.(n)

§ 749. It is, perhaps, scarcely needful to remark, that a waiver as to the time in which an act is to be done, is *not necessarily in any degree a waiver of the act itself. So that where it was agreed [*326] that A. should repair some warehouses by the 1st April, and that B. should then take a lease of them, and the repairs were not done by the day appointed, but B. continued to deal in a way which was held to amount to a waiver of the time as essential, (if by the contract it had ever been so,) and afterwards and before a lease was executed the warehouses were burnt down : it was held that B., though he had waived the essentiality of time, had not waived the condition that the repairs should be effected prior to his taking a lease, and consequently, that the proposed lessor A., and not the proposed lessee B., must bear the loss.(o)

(c) King v. Wilson, 6 Beav. 124.

(d) Pincke v. Curteis, 4 Bro. C. C. 329.

(e) Seton v. Slade, 7 Ves. 265.

(f) Hipwell v. Knight, 1 Y. & C. Ex. 401.

(g) Pegg v. Wisden, 16 Beav. 239.

(h) Parkin v. Thorold, 16 Beav. 59, 69. See also Wood v. Bernal, 19 Ves. 220.

(i) Magennis v. Fallon, 2 Moll. 561, 576. But see Sug. Vend. 291.

(k) Hudson v. Bartram, 3 Mad. 440.

(l) Ex parte Gardner, 4 Y. & C. Ex. 503.

(m) Cutts v. Thodey, 13 Sim. 206.

(n) Eads v. Williams, 4 De G. M. & G. 674.

(o) Counter v. Macpherson, 5 Moo. P. C. C. 83.

§ 750. The question whether time was originally of the essence, and whether it has since been waived, is one of evidence, and can therefore be disposed of only on the hearing.(p)

PART IV.

OF THE MODE OF EXERCISING THE JURISDICTION.

[*327]

*CHAPTER I.

OF THE INSTITUTION OF THE SUIT.

§ 751. THE most usual proceeding to obtain the specific performance of a contract, is to institute a suit by bill.

§ 752. But it is competent to a person seeking the interference of equity in specific performance, to proceed in certain cases by claim instead of by bill.

§ 753. By the first of the general orders of the 22nd April, 1850, a claim may be filed, without special leave of the court, by "a person entitled to the specific performance of an agreement for the sale or purchase of any property, seeking such specific performance." In the schedules to these orders, (A. 8 and C. 10,) are contained forms of claim and of order of reference of title adapted to cases of specific performance under the order quoted. From the terms of this order, it follows that special leave is required to file a claim for the specific performance of an agreement to grant a lease.(a) In one case,(b) leave was given to file a claim for the specific performance of a parol agreement for the sale of lands, with a statement of acts of part performance, but the court thought [*328] it a perilous case for a *claim. Leave was held not to be necessary to file a claim where, from the title having been accepted, no reference was required, but the dispute arose as to a right of road.(c)

§ 754. In a recent case(d) before Sir John Stuart, a plaintiff filed a claim for the specific performance of an agreement, involving complicated arrangements and considerations which the court considered it impossible to determine, as the case was presented by the claim, and without the assistance of an answer by the defendants: the learned judge, therefore, dismissed the claim without costs, and without prejudice to the plaintiff's right to file a bill, and at the same time expressed his dissatisfaction with the way of proceeding by claim.

(p) Levy v. Lindo, 3 Mer. 81.

(a) Keeble v. Denning, 14 Jur. 847; Scargill v. Hurry, id.; Anon. 9 Ha. Appx. 11.

(b) Barnley v. Eastern Counties Railway Company, 5 De G. & S. 314.

(c) Hemming v. Mayo, 14 Jur. 847.

(d) Rawlings v. Dalgleish, 1 Sm. & Gif. 76.

*CHAPTER II.

[*329]

OF INJUNCTIONS.

§ 755. THE jurisdiction of courts of equity in injunction is connected with the specific performance of contracts in two ways : (1) sometimes the injunction is the manner in which the court specifically performs the contract itself, (2) and sometimes the injunction is merely incident and ancillary to the performance.

§ 756. (1) It is evident that where there is a contract not to do a thing, which contract is capable of being enforced in equity, it may be, and naturally is enforced by the court, by means of an injunction restraining the doing of the act.(a)

§ 757. Therefore where articles were executed between the plaintiffs, who resided very near the church of Hammersmith, and the parson, churchwardens, overseers, and some of the other inhabitants of the parish, by which the plaintiffs covenanted to erect a new cupola, clock, and bell to the church, and the other parties covenanted that a bell which had been daily rung at five o'clock in the morning, to the great annoyance of the plaintiffs, should not be rung during the lives of the plaintiffs or the survivor of them ; the plaintiffs performed their part of the agreement, but the bell after about two years was rung again : the agreement was specifically enforced against the parish authorities by means of an injunction.(b) And again, where the proprietors *of Vauxhall [*330] Gardens had granted a lease of an adjoining house, with an express covenant not to carry on the trade of a retailer of wine, and certain other trades, upon penalty of forfeiture of the lease, and payment of £50 a month to the proprietors of the Gardens, and the lessees made an underlease to the defendant : the court granted an injunction to restrain the defendant from carrying on the business, the lord chancellor remarking, "it is in the nature of a specific performance. I think you will find many cases. The breach of the agreement may consist in repeated acts."(c)

§ 758. Again, where the commissioners of woods and forests granted a piece of land to the plaintiffs for the purpose of erecting a club-house, and agreed that a piece of land adjoining to that leased should be laid out as a garden, and not be built on, and the commissioners subsequently permitted certain persons to erect stables on this piece of ground : the court specifically performed the stipulation in question, by enjoining the defendants from the prosecution of such buildings, or the erection of any others, and from permitting such parts of the buildings as were already erected from remaining thereon.(d) And so where a partner abstracted a partnership book from the counting-house, contrary to a covenant in

(a) Per Lord St. Leonards in Lumley v. Wagner, 1 De G. M. & G. 616.

(b) Martin v. Nutkin, 2 P. Wms. 266.

(c) Barret v. Blaggrave, 5 Ves. 555 ; S. C. 6 Ves. 104 ; cf. Newberry v. James, 2 Mer. 446 ; Williams v. Williams, 3 Mer. 157.

(d) Rankin v. Huskisson, 4 Sim. 13.

the deed of partnership, specific performance of this was enforced by means of an injunction.(e)

§ 759. And so where, in consideration of a sum of money, A. covenanted with B. not to act on the stage within a certain district, the court enforced the covenant by injunction.(f)

[*331] § 760. In cases of covenants not to carry on trade within *particular districts, the covenant when enforced by the court is so by means of injunction.(g)

§ 761. Where the acts complained of are frequent, and the court cannot ascertain whether there has in each case been a breach without an action at law, the court will not interfere by injunction,—as, for example, in the case of a covenant not to sell water from a certain well to the plaintiff's injury, for the court would have to try in each instance whether the act of selling water was to the prejudice of the plaintiffs.(h)

§ 762. One mode in which specific performance by means of injunction has sometimes been sought, is in respect of agreements not to apply to parliament. For it is perfectly clear that courts of equity have power, upon a proper case being made out, to enjoin a person from petitioning parliament; for the court merely acts *in personam*, and does not therefore in any way interfere with the proceedings of parliament.(i)

§ 763. What is a proper case for this interference of the court is a question of some difficulty. The fact that the intended application to parliament will abrogate existing rights and create new ones can give no right to such an injunction, for that would be to restrain parliamentary interference in all such cases.(k) Nor will the court interfere, even where for the protection of private interests an agreement not to apply to parliament has been entered into, provided the party making the application to the legislature may urge it upon grounds of public policy, of which *parliament can judge, but a court of equity cannot.(l)

[*332] This seems to apply to all cases in which the application is in soliciting a bill, for in all such cases grounds of a public nature may be urged. The only case therefore in which the court would interfere, appears to be where the applicant would oppose a bill alone on grounds of his private interest.(m)

§ 764. In a case, therefore, where the defendant company agreed with the plaintiff company not to make any line connecting their respective

(e) *Taylor v. Davis*, 3 Beav. 388, n.

(f) Anon. mentioned by V. C. of England in *Kimberley v. Jennings*, 6 Sim. 351; *Lumley v. Wagner*, 1 De G. M. & G. 604; ante, § 557.

(g) *Williams v. Williams*, 2 Sw. 253. See also *Shackle v. Baker*, 14 Ves. 468; *Crutwell v. Lye*, 17 Ves. 335; *Harrison v. Gardner*, 2 Mad. 198.

(h) *Collins v. Plumb*, 16 Ves. 454.

(i) *Ware v. Grand Junction Waterworks Company*, 2 Russ. & My. 470, 483; *Heathcote v. North Staffordshire Railway Company*, 2 M'N. & G. 100; *Lancaster and Carlisle Railway Company v. Northwestern Railway Company*, 2 K. & J. 293. See also *Attorney-General v. Manchester and Leeds Railway Company*, 1 Rail. C. 436.

(k) *Heathcote v. North Staffordshire Railway Company*, 2 M'N. & G. 100.

(l) *Lancaster and Carlisle Railway Company v. Northwestern Railway Company*, 2 K. & J. 293.

(m) *S. C. and Stockton and Hartlepool Railway Company v. Leeds and Thirsk Railway Company*, 2 Ph. 666.

railways, except one which had been already applied for by the defendants, and in consideration of this the plaintiffs agreed to support, instead of opposing (as they had previously done) the application of the defendants for the last-mentioned line, and the plaintiffs performed their part of the agreement, and the defendants' application was successful : the court nevertheless refused to restrain the defendants from applying to parliament in contravention of their agreement, considering that such an application, if successful, would be so on public grounds, of which the court could not judge, and that if rejected, the breach of the agreement, if a legal one, might be compensated for in damages.(n)

§ 765. In the cases already considered the agreements were negative : but where the contract is in form affirmative, the court has sometimes given effect to it by an injunction against the opposite.

§ 766. Thus, where the defendant had leased mills to the plaintiff, and had covenanted for the supply of water to them from certain canals and reservoirs, and the lessee brought his suit to enforce the doing of repairs by the defendant to enable him to enjoy the water : Lord Eldon doubting about affirmatively decreeing repairs, arrived at the end sought *by the bill, by granting an injunction against hindering the [*333] plaintiff's enjoyment of his rights, by keeping the canal and works out of repair.(o) And in another case,(p) his lordship carried into effect an agreement to grant a right of way by granting an injunction to restrain the removal of the materials and the destruction of the way.

§ 767. In the case of *Rankin v. Huskisson*,(q) already referred to, where certain buildings had been begun in contravention of an agreement to leave certain land as a garden, the injunction was not merely against building for the future, but also against permitting such buildings as had been already erected from continuing on the ground. And where the defendant had covenanted to leave sufficient barriers against adjoining collieries, and had not done so, an injunction was granted by Lord Langdale, restraining the defendant, amongst other things, from permitting the communication to continue open.(r)

§ 768. The practice of granting these mandatory injunctions, which are not confined to cases of contract,(s) has been disapproved of by Lord Brougham, as being a roundabout mode of attaining the object, which seems to cast a doubt upon the jurisdiction itself.(t) It is to be observed that this species of relief by injunction will be extended only so far as the plaintiff, at the time and on the evidence, establishes a case for protection ; so that though the plaintiff may establish that necessity as to certain breaches, the court will not extend the injunction so as to restrain all acts in breach of the covenants of the lease.(u) In this respect the

(n) *Lancaster and Carlisle Railway Company v. Northwestern Railway Company*, 2 K. & J. 293.

(o) *Lane v. Newdigate*, 10 Ves. 192. (p) *Newmarch v. Brandling*, 3 Sw. 99.

(q) 4 Sim. 13. See also *Whittaker v. Howe*, 3 Beav. 383.

(r) *Earl of Mexborough v. Bower*, 7 Beav. 127.

(s) For this class of injunctions generally, see *Drewry on Injunctions*, part ii. ch. 6, s. 8, et seq.

(t) See *Blakemore v. Glamorganshire Canal Navigation*, 1 My. & K. 154, 184; *Milligan v. Mitchell*, 1 My. & K. 446.

(u) *Earl of Mexborough v. Bower*, 7 Beav. 127.

[*334] *jurisdiction in question is evidently distinct in character from specific performance.

§ 769. (2) The jurisdiction of the court in injunction is often ancillary to that in specific performance, for the purpose of preventing the defendant making a use of the legal interest vested in him in a way inconsistent with the equity claimed by the plaintiff, and from embarrassing the plaintiff by dealing with the property during the pendency of the suit. "The court will in many cases interfere and preserve property *in statu quo* during the pendency of a suit, in which the rights to it are to be decided, and *that* without expressing, and often without having the means of forming any opinion as to such rights."(v) In the class of cases now to be considered, the injunction is therefore granted on the plaintiff's showing a *prima facie* case for specific performance.(w) And so it is not necessary, in order to continue the injunction, that it should be clear that the plaintiff will succeed at the hearing; it is sufficient if there is ground for supposing that relief may be given.(x) For on this motion the court will not decide delicate points,(y) nor allow it to be resisted on points, such as delay, which can only be decided at the hearing.(z)

§ 770. Accordingly, where a lessor was sued by a lessee for the specific performance of an agreement to grant a lease, he was restrained from bringing an ejectment during the suit.(a) In another case, the plaintiff obtained an injunction to restrain the vendor from conveying away the legal estate, which might compel the plaintiff to make some other person [*335] a party to the suit.(b) In another case, an injunction *to restrain a sale of the estate as to which specific performance was sought, was granted on certificate of the bill having been filed and affidavit.(c) And in another case, an injunction was granted to restrain a purchaser, who had got into possession, from cutting timber on the estate.(d)

§ 771. Injunctions are also granted to restrain actions for the deposit upon its being paid into court,(e) or to restrain actions for damages for delay in completion, on the principle that where the court entertains jurisdiction, it will not permit an action at law to proceed in respect of the same subject-matter.(f)

§ 772. The question whether in a suit for the specific performance of an agreement for a separation deed between husband and wife, a court of equity will interfere by injunction to restrain a suit for the restitution of conjugal rights, as incident to the main object of the suit in equity, can hardly be said to be determined, though it has been twice discussed by

(v) Per Lord Cottenham in Great Western Railway Company v. Birmingham and Oxford Junction Railway Company, 2 Phil. 602.

(w) Powell v. Lloyd, 1 Y. & J. 427.

(x) Hudson v. Bartram, 3 Mad. 440; Attwood v. Barham, 2 Russ. 186.

(y) Price v. Assheton, 1 Y. & C. Ex. 82. (z) Levy v. Lindo, 3 Mer. 81.

(a) Boardman v. Mostyn, 6 Ves. 467; Buckland v. Ifall, 8 Ves. 92; Attwood v. Barham, 2 Russ. 186.

(b) Echilif v. Baldwin, 16 Ves. 267.

(c) Curtiss v. Marquis of Buckingham, 3 V. & B. 168; Spiller v. Spiller, 3 Sw. 556.

(d) Crockford v. Alexander, 15 Ves. 138.

(e) Fordyce v. Ford, 4 Bro. C. C. 494.

(f) Duke of Beaufort v. Glynn, 3 Sm. & Gif. 213, 226.

the house of lords in the case of Wilson v. Wilson,(g) opposite opinions having been expressed on the point by the learned lords by whom the case was decided.

§ 773. The court will, in some cases, restrain third persons, whose rights are independent of the contract, acting in a manner which would prejudice the plaintiff in respect of the property. So where after an agreement for the sale of an advowson the incumbent died, and a bill was filed against the vendor and the bishop, the court restrained the vendor from presenting, and the bishop from instituting, or in case of a lapse taking place pending the suit, from collating to the living any clerk not nominated by the plaintiff.(h)

§ 774. In this as in all other cases of *ex parte* injunctions, [*336] *the court will grant them with great caution. In one case,(i) Lord Eldon said, “I wish it to be understood as my opinion, that, in general, on a bill for the specific performance of an agreement to sell, the plaintiff is not entitled to restrain the owner from dealing with his property: a different doctrine would operate to control the rights of ownership, although the agreement was such as could not be performed;” but he granted an injunction under the circumstances of that case, restraining the vendors of certain copyhold property, from surrendering it to any other persons than the plaintiffs, who were in possession and had paid part of the purchase-money. In Turner v. Wright,(k) Lord Langdale refused a motion for an injunction to restrain a vendor from letting the estate, and from selling and conveying the same except to the plaintiff, on the ground that a purchaser *pendente lite* would take subject to the rights of the plaintiff.

*CHAPTER III.

[*337]

ON THE WRIT OF NE EXEAT.

§ 775. In some cases a writ of *ne exeat* is issued in suits for specific performance; but only in cases where it appears that there is no reasonable doubt that the agreement under which the money is payable is one of which the plaintiff is entitled to specific performance.(a)

§ 776. It may issue where there has been a decree for payment of the purchase-money, even though by the decree that was made subject to a deduction for compensation which had not been ascertained.(b)

§ 777. It has been held that this writ cannot be granted unless prayed

(g) 1 Ho. Lords, 538; S. C. 5 Ho. Lords, 40.

(h) Nicholson v. Knapp, 9 Sim. 326. (i) Spiller v. Spiller, 3 Sw. 556.

(k) 4 Beav. 40.

(a) Raynes v. Wyse, 2 Mer. 472; Blaydes v. Calvert, 2 J. & W. 211; Jenkins v. Parkinson, 2 My. & K. 5; Morris v. McNeil, 2 Russ. 604.

(b) Boehm v. Wood, T. & R. 332.

in the bill; and that where this has not been the case, and the writ becomes necessary in the course of the proceedings, a supplemental bill should be filed stating the facts, and praying the writ.(c)

[*338]

*CHAPTER IV.

OF RELIEF SUBSEQUENT TO THE DECREE.

§ 778. THE Court of Chancery having once had jurisdiction in a suit over the subject-matter of it, will not, except by its permission, allow resort to any other forum in respect of that subject-matter, either when the proceedings are pending in the court or after decree, except in cases where the right to sue at law arises on instruments executed under the decree.(d) But where the decree has been entirely executed and the cause thus out of court, any relief sought in equity can only be granted on a new bill.(e)

§ 779. On the general principle above stated, the court, after a decree for specific performance, restrained the defendant in equity from bringing an action against the plaintiff in equity for damages in respect of the non-completion of the contract within the specified time.(f) And so where the defendant had agreed to convey to the plaintiff certain lands adjoining a stream, and the plaintiff had agreed to erect a bridge across the stream: the plaintiff had obtained a decree for specific performance, and a reference was directed to the master to settle a conveyance, and after the decree, and pending the proceedings before the master, the defendant brought an action against the plaintiff for damages *for [*339] the non-erection of the bridge by him: the plaintiff filed a supplemental bill, praying an injunction to restrain the defendant from proceeding in the action, to the prayer of which the court acceded.(g)

§ 780. The same principle was strongly enforced in the recent case of Prothero v. Phelps,(h) before the lords justices. There Phelps had originally obtained a decree against Prothero which was in effect for specific performance of an agreement between them of a complicated character, for the assignment of certain leasehold property by Phelps to Prothero. Phelps subsequently began an action at law against Prothero for alleged breaches of the agreement in question, by which he alleged that he had been prevented from attending to his lawful affairs, and injured in his credit and reputation. To this action Prothero pleaded on equitable grounds the proceedings in chancery, which plea was overruled: he then filed a supplemental bill, praying for an injunction to restrain the action; the lords justices held that the court having jurisdiction of the subject-

(c) Sharp v. Taylor, 11 Sim. 50. But see Burned v. Laing, 13 Sim. 255.

(d) Prothero v. Phelps, 25 L. J. Ch. 105, (L. JJ.); Bell v. O'Reilly, 2 Sch. & Lef. 430; Humphreys v. Horne, 3 Ha. 276. See also Small v. Attwood, 3 Y. & C. Ex. 105.

(e) Ford v. Compton, 1 Cox, 296. (f) Reynolds v. Nelson, 6 Mad. 290.

(g) Frank v. Basnett, 2 My. & K. 618. (h) 25 L. J. Ch. 105.

matter, the plaintiff at law could not proceed without the permission of the court : that he ought to have submitted his claim for damages to the court of equity which was competent to ascertain them : and they therefore directed an inquiry as to such damages, and restrained the action at law.

§ 781. Another species of relief after decree is to be found in a case,(i) where, after a decree for specific performance against a purchaser, the defendant made default in payment of the purchase-money, and it was determined that the vendor might on motion rescind the contract. In such cases the court will, it seems, appoint a future day before which payment must be made, or the contract will be rescinded.

PART V. OF INCIDENTAL MATTERS.

*CHAPTER I.

[*340]

OF CONDITIONS OF SALE AND PARTICULARS.

§ 782. THE conditions of sale subject to which property is sold, constitute part of the contract. Particular conditions of sale are considered in several other parts of these pages.(a) But it will be desirable here briefly to state the general principles upon which the court acts in construing conditions.

§ 783. It is to be observed, in the first place, that the circumstances connected with the title and character of the property are, of course, in the knowledge of the vendor rather than of the purchaser; and, secondly, that the legal right of a purchaser is, independently of stipulation, to have a good title and an estate free from all incumbrances; and, therefore, that conditions tending to give the purchaser less than this are in restraint of a common law right.

§ 784. Proceeding on these principles, the courts have held that it is incumbent on the vendor to express himself with reasonable clearness, and in the case of sales by auction, so to state his plans, particulars, and conditions of sale as to convey clear information to the class of persons who ordinarily frequent auctions.(b) If the vendor uses *terms reasonably capable of misconstruction, or ambiguous words, the [*341] purchaser is not bound to take on himself the peril of ascertaining the true meaning of the statement,(c) but may generally construe it in the

(i) *Foligno v. Martin*, 16 Beav. 586. (a) See also *Sugd. Vend. ch. i. s. 2.*

(b) *Gibson v. d'Este*, 2 Y. & C. C. 542, 558, 559; *Dykes v. Blake*, 4 Bing. N. C. 463, 476.

(c) *Martin v. Cotter*, 3 Jon. & Lat. 496; *Greaves v. Wilson*, 4 Jur. N. S. 271.

manner most advantageous to himself: (d) and the court will be very unwilling, even on exceptions, to hold a purchaser to his bargain. (e)

§ 785. So where there was an ambiguity as to which of two leases was referred to, the purchaser's construction was admitted by the court, and the bill dismissed: (f) so a condition that no title should be called for prior to the lease was not held so explicit as to preclude inquiry into dealings with the contract for the lease which had taken place prior to its being granted: (g) and where a vendor selling a reversionary estate stipulated that a statement in a deed of 1836 that a life annuity had not been paid for eight years, and a declaration by the vendor that no claim had been made on him since 1841, and that he believed the annuity had not been claimed for the last twenty years, should be conclusive evidence that the annuity had determined: and it appeared that the annuity was granted by a person entitled only in reversion, and that it was granted for the life of the survivor of four persons, it was held that the description of it as a life annuity was likely to lead to the belief that the annuity was for one life only, and that the omission to state the facts disentitled the vendor to specific performance. (h) And so, again, where property sold was described as subject to articles of agreement bearing date 1804, for a lease for four lives and one year, and in fact the terms of the agreement were such that the lives were not named until 1845, [*_342] this was considered so ambiguous *as to amount to an objection to the performance of the agreement. (i)

§ 786. The inclination of the courts to construe conditions of sale strictly is shown by many other cases, (k) but, perhaps, it is not more strongly illustrated by any case than a recent one (l) at the rolls, where, on a sale of leases, the conditions stipulated that possession should be deemed conclusive evidence of the due performance, or sufficient waiver of any breach in the covenants of the lease up to the completion of the sale: the master of the rolls held that it covered all breaches up to the date of the contract, but not a breach between the contract and completion for which the lessor was entitled to enter, and that notwithstanding the express words "up to the completion of the sale."

§ 787. The court construing conditions thus strictly, will not by implication extend the terms of one condition so as to enlarge another beyond what it actually expresses. In the case of *Southby v. Hutt*, (m) the interpretation of conditions in this respect was fully considered. There, by the conditions of sale, the vendor agreed to deliver an abstract and deduce a good title, except as to part of the estate acquired under

(d) *Seaton v. Mapp*, 2 Coll. C. C. 556.

(e) *Taylor v. Martindale*, 1 Y. & C. C. C. 658.

(f) *Seaton v. Mapp*, 2 Coll. C. C. 556.

(g) *Rhodes v. Ibbetson*, 4 De G. M. & G. 787.

(h) *Drysdale v. Mace*, 2 Sm. & Gif. 225, affirmed 5 De G. M. & G. 103.

(i) *Martin v. Cotter*, 3 Jon. & J. 496.

(k) *Southby v. Hutt*, 2 My. & Cr. 207; *Symonds v. James*, 1 Y. & C. C. C. 487; *Adams v. Lambert*, 2 Jur. 1078; *Cruse v. Nowell*, 25 L. J. Ch. 709, (*Kindersley, V. C.*); *Brumfit v. Merton*, 3 Jur. N. S. 1198, (*Stuart, V. C.*)

(l) *Howard v. Knightley*, 21 Beav. 331.

(m) 2 My. & Cr. 207; *Osborne v. Harvey*, 7 Jur. 229. See also *Gabriel v. Smith*, 16 Q. B. 847.

an inclosure, as to which he was not to be required to go back beyond the award ; and by a subsequent condition it was stipulated that the vendor should deliver to the largest purchaser all deeds in his custody, but should not be required to produce any other deeds than those in his possession and set forth in the abstract : and it was held that the latter condition did not so affect the former as to entitle the vendor to insist on *verifying his abstract only so far as could be done by deeds [*343] in his possession, but that the purchaser was entitled to a general verification. And so a condition that certain specified deeds only should be given up, does not limit the title to be shown to that disclosed by these deeds.(n)

§ 788. It is a natural principle of interpretation, that a vendor shall never be allowed to avail himself of the conditions of sale for the purpose of acting fraudulently : so that a condition for compensation will not apply where there has been misrepresentation :(o) and under a condition giving a vendor a power of rescission in case of any objections to the abstract, he will not be permitted fraudulently to deliver an imperfect abstract to which objections would necessarily be taken, and thereupon avail himself of his fraud to avoid his contract by means of this condition :(p) and so it seems that a condition as to objections to title being delivered by a certain time, would not apply where there had been misrepresentation.(q)

§ 789. Where conditions state facts upon which they are grounded, these facts must be proved.(r)

§ 790. Where the vendor states facts, and then states that the purchaser shall take such interest as the vendor under such state of facts has, the purchaser is, it seems, bound to take the title as it is ; but where, after stating facts, the conditions add as a positive and distinct fact, and not as a conclusion of law from the preceding circumstances, that the vendor can make a good title to the fee : as this title may have arisen from independent sources, the purchaser is not bound by the title resulting from the facts, but may inquire generally whether the vendor can make out a good title.(s)

*C H A P T E R II.

[*344]

OF COMPENSATION.

§ 791. WE have already seen that where a vendor has not all the estate he has contracted to sell, the purchaser may, generally speaking, insist on taking what the vendor has : and also that where a vendor is

(n) *Dick v. Donald*, 1 Bli. N. S. 655.

(o) *Stewart v. Alliston*, 1 Mer. 26. See post, § 812.

(p) *Per Wigram, V. C.*, in *Morley v. Cook*, 2 Ha. 111.

(q) *Price v. Macaulay*, 2 De G. M. & G. 339, 347.

(r) *Symonds v. James*, 1 Y. & C. C. C. 487.

(s) *Johnson v. Smiley*, 17 Beav. 223.

able to fulfil the contract in its substance, but unable to fulfil it literally in all its parts, he may yet sue the purchaser for its specific performance.

§ 792. From these two principles arises the right to compensation in the purchaser in respect of the defect in the estate, which he himself insists on taking, or which the vendor insists that he shall take. It must be borne in mind that the subjects of compensation in the two cases are greatly different, and that many defects for which the purchaser may insist on compensation would not be made the subjects of compensation at the instance of the vendor.(a)

§ 793. Where the vendor seeks to enforce the performance of a contract with compensation, his bill is demurrable, unless it show that the defect is a fit subject for compensation.(b) The bill ought distinctly to raise the question of compensation: and it has been recently held by Vice-Chancellor Stuart that where the whole of the vendor's bill was framed on the view that a good title had been shown at the time prescribed, and that was the sole *issue raised by it, and the court [*345] held that the plaintiff had failed in that contention, specific performance would not be enforced with compensation.(c) If the purchaser is plaintiff, and is aware of any case for compensation, it seems to be the best course to allege it on the bill; but compensation may be granted for a defect appearing on the investigation of title, though the frame and prayer of the bill and the decree made at the hearing make no reference to compensation.(d)

§ 794. In early times the court did not entirely disclaim jurisdiction in respect of damages, where they were incident to the subject-matter already in contention before the court.(e) Subsequently, however, the jurisdiction was disowned, and a broad distinction set up between compensation and damages. The extent and measure of the one are different from those of the other, so that, to follow the illustration given by Lord Eldon, if A. contract to sell to B. an estate tithe free, and B. contract to sell it to C. on the same conditions, and it is found that A. cannot convey tithe free, he may be compelled to make compensation for the difference in the value of the property, but not for the damage sustained by B. from being unable to complete his contract with C.(f)

§ 795. At present, however, the court manifests an inclination to return to the original view of its jurisdiction, and to assist in the ascertainment of damages where these are essential to complete justice in the case before it. Thus, in a recent case,(g) A. having obtained a decree [*346] *against B. for the specific performance of an agreement, brought

(a) For instance, compare *Nelthorpe v. Holgate*, 1 Coll. C. C. 203, with *Collier v. Jenkins*, You. 295. See also *Wilson v. Williams*, 3 Jur. N. S. 810, (Wood, V. C.)

(b) *Bowyer v. Bright*, 13 Pri. 698.

(c) *Ashton v. Wood*, 3 Jur. N. S. 1164; S. C. 3 Sm. & Gif. 436.

(d) *Wilson v. Williams*, 3 Jur. N. S. 810, (Wood, V. C.)

(e) *Cleaton v. Gower, Finch*, 164; *City of London v. Nash*, 3 Atk. 512, where Lord Hardwicke refused specific performance, but relieved by way of damages, to be ascertained by an issue of *quantum damnicatus*. See also post, § 938.

(f) Per Lord Eldon in *Todd v. Gee*, 17 Ves. 278; *Jenkins v. Parkinson*, 2 My. & K. 5.

(g) *Prothero v. Phelps*, 25 L. J. Ch. 105, (L. JJ.)

an action at law for the consequent damages which he alleged himself to have sustained by the destruction of his business: B. then filed a bill against A. asking that he might be restrained from proceeding at law, to which the court acceded, notwithstanding the argument that the court could not give damages. "That it is competent to this court to ascertain damages, I feel no doubt," said the Lord Justice Turner.(h) "It is the constant course of the court in the case of vendor and purchaser, where a sufficient case is made for the purpose, to make an inquiry as to the deterioration of the estate, and in so doing, the court is, in truth, giving damages to the purchaser for the loss sustained by the contract not having been literally performed." It is impossible not to see the great propriety of courts of equity being clothed with such a jurisdiction, so that in cases coming before them by way of specific performance, complete justice may be done to the suitors without their resorting to any other forum. One object of the recent legislative changes in the administration of the law has been to enable courts of law and equity to do complete justice in matters arising within their respective jurisdictions: and it is in entire accordance with this that courts of equity should proceed by way of damages in the cases where complete justice requires their payment.(i)

§ 796. The court, where it sees fit, may direct an issue to ascertain the amount of compensation in the nature of damages.(k)

§ 797. The contract will not be enforced with compensation where a material part of the subject-matter is wanting. Formerly the court went far beyond what it now does *in enforcing contracts substantially different from those entered into, as where a wharfinger who contracted for a house and wharf was compelled to take the house without the wharf: but of this mode of proceeding Lord Eldon frequently expressed his disapproval, and it is now abandoned by the court. [*347] "The court," said Lord Eldon on one occasion,(m) "is from time to time approaching nearer to the doctrine that a purchaser shall have that which he contracted for, or not be compelled to take that which he did not mean to have."

§ 798. Accordingly, where a wharf and jetty were contracted to be sold, and it turned out that the jetty was liable to be removed by the Corporation of London, specific performance was refused.(n) In the case of the sale of a residence and four acres of land, a slip of ground of about a quarter of an acre between the house and the high-road to which no title was made, was held not to be a subject of compensation.(o) In another case, a yard which was essential to the enjoyment of the premises,

(h) p. 108.

(i) See the state of the law as practised in the American Courts, (where some diversity appears to prevail,) stated by Mr. Justice Story, Eq. Juris., § 798, n.

(k) Ferguson v. Tadman, 1 Sim. 530; Nelson v. Bridges, 2 Beav. 239.

(l) Drewe v. Hanson, 6 Ves. 675; Halsey v. Grant, 13 Ves. 73; Stapylton v. Scott, 13 Ves. 425; Knatchbull v. Gruebar, 3 Mer. 124. See also Howland v. Norris, 1 Cox, 59. The decision in Shirley v. Davis, to which Lord Eldon frequently alludes, appears to have been in fact the opposite of that which his lordship stated. Shirley v. Stratton, 1 Bro. C. C. 440, n. (2).

(m) 3 Mer. 146.

(n) Piers v. Lambert, 7 Beav. 546.

(o) Perkins v. Ede, 16 Beav. 193.

was held from year to year instead of for the term of twenty-three years, for which the rest of the premises was held, and at a separate rent: this was considered to be a defect not within a condition for compensation for misdescription of the property or any other error whatsoever in the particulars. (*p*) And in one case, (*q*) Lord Eldon thought that a defect in title in respect of eleven out of seventy acres which do not appear to have been peculiar in their position or character, "would probably be material to the suit."

[*§ 799.] *§ 799. In some cases a part of the estate contracted for may be material, because if any one else were to possess it, it would probably be turned to some purpose prejudicial to the enjoyment of the estate, as where land near a mansion was such that it would be most profitably used for building-ground or for a brick kiln. (*r*) But the nuisance thus apprehended must be probable, and not merely distant, fanciful, and conjectural. (*s*)

§ 800. The same principle of course applies where, though the whole land is capable of being conveyed, it, or a part of it, is subject to rights which materially affect its enjoyment: thus a right of way which would render useless for building a close advertised as building-ground, does not come within a condition for compensation; (*t*) so grants of rights to the owners of lower lands, to fetch water from a spring on the upper lands, to cut and cleanse drains leading the water to the lower lands and other similar rights having reference to four and a half acres out of about thirty sold, were held to constitute a material defect in the title to the upper lands, and consequently were not the subject of compensation, notwithstanding a condition that a mistake in the description or an error in the particulars should be the subject of compensation, and not annul the contract. (*u*)

§ 801. In the following cases, on the other hand, the defect has been considered not essential, but a proper subject of compensation: where there was an objection to the title of six acres out of a large estate, and those acres do not appear to have been material to the enjoyment of the rest; (*v*) where fourteen acres were sold as water-meadow, and twelve only answered that description; (*w*) and where on a purchase by the tenant in possession property described *as forty-six feet in depth proved to be but thirty-three feet. (*x*)

[*§ 802.] § 802. Where there is a variation in the quantity of the estate, the principle on which the abatement is calculated is *prima facie* average: but where woodland was sold as so many acres, and the wood as having been valued at so much, the abatement was for so much as the soil covered with wood would be worth without the wood. (*y*)

§ 803. Nor will compensation be applied even where there is a con-

(*p*) Dobell v. Hutchinson, 3 A. & E. 355.

(*q*) Osbaldiston v. Askew, 2 J. & W. 539.

(*r*) Knatchbull v. Gruuber, 1 Mad. 153.

(*s*) S. C.

(*t*) Dykes v. Blake, 4 Bing. N. C. 463.

(*u*) Shackleton v. Sutcliffe, 1 De G. & Sm. 609.

(*v*) M'Queen v. Farquhar, 11 Ves. 467. (*w*) Scott v. Hanson, 1 R. & My. 128.

(*x*) King v. Wilson, 6 Beav. 124. See also Cann v. Cann, 3 Sim. 447.

(*y*) Hill v. Buckley, 17 Ves. 394.

dition of sale providing for compensation where there is a misdescription "in a material and substantial point, so far affecting the subject-matter of the contract as that it may be reasonably supposed that, but for such misdescription, the purchaser might never have entered into the contract at all."(z) Thus, compensation will not be enforced where the main part of the estate sold as freehold was not freehold, but leasehold for a long term :(a) and where the particulars of a leasehold house in Covent Garden stated that by the lease "no offensive trade was to be carried on, and that the premises could not be let to a coffee-house-keeper or working hatter," and there was a condition for compensation in case of error or misstatement, and the original lease, in fact, prohibited a vast variety of other businesses than those described, including the sale of any provisions, the purchaser was held to be entitled to rescind the contract.(b) Accordingly, where leasehold property was sold for the residue of a term of ninety-nine years, which commenced on the 24th June, 1838, under conditions which prohibited the purchaser's calling for the lessor's title, and stipulated that any error or misstatement of the property, term of years, or other description, should not vitiate the sale, but that a compensation *should be given : the term sold was really not the residue described, but a derivative term less by three days than [*350] the original one : the court held that the underlease was not substantially the same thing, the resulting rights being different, and accordingly dismissed with costs a bill praying for specific performance with compensation.(c)

§ 804. Compensation will, however, be given in cases where the tenure, though not as stated, is nearly the same, as where lands sold as freehold were copyholds of which the tenure under a composition with the lord was scarcely different from freehold.(d) But in a previous case(e) before the master of the rolls, where there was a condition for compensation in the case of error in the description of the premises, or of any other error whatsoever in the particulars, and the property which was described as copyhold turned out to be partly freehold, Sir John Romilly refused to compel specific performance against the purchaser : he had contracted to purchase one thing, and he might refuse to accept another.

§ 805. It is not easy to lay down any definite rule with regard to what incumbrances are, and what are not, the proper subjects of compensation.

§ 806. Compensation has been allowed for small annual payments out of tithes,(f) and for quit-rents and rent-charges where small.(g)

(z) Per Tindal, C. J., in *Flight v. Booth*, 1 Bing. N. C. 377.

(a) *Fordyce v. Ford*, 4 Bro. C. C. 494; *Drewe v. Corp*, 9 Ves. 368; S. C. 1 S. & S. 201, n.

(b) *Flight v. Booth*, 1 Bing. N. C. 370.

(c) *Madeley v. Booth*, 2 De G. & Sm. 718. See this case referred to, *Darlington v. Hamilton*, 1 Kay, 550.

(d) *Price v. Macaulay*, 2 De G. M. & G. 339. In *Hick v. Phillips*, Prec. in Ch. 575, a bill by a vendor of an estate which in the articles was treated as freehold, was refused because about one-sixth in value was copyhold, but nothing is stated as to the peculiar nature of the tenure.

(e) *Ayles v. Cox*, 16 Beav. 23.

(f) *Horniblow v. Shirley*, 13 Ves. 81; *Halsey v. Grant*, 13 Ves. 73.

(g) *Esdaile v. Stephenson*, 1 S. & S. 122.

§ 807. But it has been refused in respect of draining and embanking taxes charged on fen-lands by a local but public act,(h) and of a lease for life at a low rent.(i)

[*351] *§ 808. And so with regard to tithes, which, though they were formerly held a subject for compensation,(k) are now considered not to be so.(l) Where, however, the circumstances showed that the question whether the land was to be tithe free or not, was an immaterial one in the view of the purchaser, and the tithes were not likely to arise, the court enforced the contract with compensation :(m) and the same was done where only part of the estate was sold as tithe free, and it turned out that only a smaller part was.(n)

§ 809. Indemnity is a species of compensation, inasmuch as something else is given in place of the very thing contracted for: it is applicable to those cases where the loss is not certain, but contingent; and it seems that wherever a party is entitled to compensation in respect of such a loss, he may, at his election, have an indemnity.(o)

§ 810. But the court will not compel a purchaser to take an indemnity, unless such indemnity were part of the contract between the parties, even in respect of a defect which might be the subject of compensation :(p) nor against a material incumbrance,(q) nor in respect of a misdescription :(r) still less where the contingency against which the indemnity is proposed would imperil the whole subject-matter of the contract.(s) But the purchaser may in many cases take an estate with an indemnity, (as, for instance, against a widow's dower,) where the vendor could not compel the purchaser to accept it.(t)

[*352] *§ 811. The cases where the defect is from its magnitude or importance, not a proper subject for compensation, have been already stated. We may now consider some other cases, where the doctrine will not be applied.

§ 812. The principle of compensation, whether arising under the general doctrine of the court, or under a condition for compensation in case of any error or misstatement, will not be applied where there has been misrepresentation,(u)—even, it seems, though the difference be of such a character that, if it had arisen from error, it would have been subject to compensation, as, for instance, in respect of the difference between copyholds nearly equal in value to freeholds, and freeholds.(v) And so

(h) Barraud v. Archer, 2 Sim. 433; affirmed on appeal, 2 R. & My. 751.

(i) Collier v. Jenkins, You. 295. In Nelthorpe v. Holgate, 1 Coll. C. C. 203, compensation for an outstanding life-estate was enforced against the vendors.

(k) Lord Stanhope's Case, cited 6 Ves. 678.

(l) Ker v. Clobery, Sug. Vend. 165; Binks v. Lord Rokeby, 2 Sw. 222.

(m) Smith v. Tolcher, 4 Russ. 302.

(n) Binks v. Lord Rokeby, 2 Sw. 222. (o) Milligan v. Cooke, 16 Ves. 1.

(p) Balmanno v. Lumley, 1 V. & B. 224; per Lord Eldon in Paton v. Brebner, 1 Bl. 66; Aylett v. Ashton, 1 My. & Cr. 105.

(q) Wood v. Bernal, 19 Ves. 220. (r) Ridgway v. Gray, 1 M^N. & G. 109.

(s) Fildes v. Hooker, 3 Mad. 193.

(t) Wilson v. Williams, 3 Jur. N. S. 810, (Wood, V. C.)

(u) Per Sir Thos. Plumer in Viscount Clermont v. Tasburgh, 1 J. & W. 120; Duke of Norfolk v. Worthy, 1 Camp. 337, 340; Powell v. Doubble, Sug. Vend. 23; Stewart v. Alliston, 1 Mer. 26; cf. Morley v. Cook, 2 Ha. 111.

(v) Price v. Macaulay, 2 De G. M. & G. 339, 344.

where there was a misrepresentation as to the tenancy of the house, the court refused to hold the purchaser to his contract and give him compensation for the delay, which would have been needed for an ejectment, although the purchaser bought for investment, and not for residence.(w)

§ 813. It is a necessary principle that, where there are no data from which the amount of compensation can be ascertained, the court cannot enforce the contract with compensation. But the objection that the compensation is unascertainable is one which the court is unwilling to entertain; and it grants relief with compensation in many cases in which the ascertainment of the amount to be paid cannot be said to be certain or exact, but only the reasonable estimate from the evidence of competent persons; as, for instance, in compensation, for a right to dig coals in the land sold.(x)

*§ 814. But where this reasonable estimate is not attainable, [*353] the court refuses compensation: thus, where a house and grounds were sold by the court, and, pending the making out of the title, some ornamental timber was cut down, the purchaser was discharged and not compensated, because the act affected the value of the property to the purchaser as a residence, in a way which the court was unable to measure.(y) And where the particulars represented the average size of the timber in the wood, which was the property sold, as approaching 50 feet, but in no way specified the number of the trees; and the plaintiff's witnesses treated no trees containing less than 10 feet as timber trees, and on this basis showed an average of 34 feet 6 inches; whilst the defendant's witnesses, reckoning all trees containing not less than 5 feet as timber trees, showed an average of 22 feet only; the court held that the subject-matter sold fell short of the description but, in the absence of any representation as to the number of trees, the court had no data for calculation, and therefore could not give compensation, but dismissed the bill.(z)

§ 815. The same principle seems to have governed another case, in which the premises were described as in the joint occupation of A. and B. as lessees, whereas they were in fact, in their joint occupation, but not as lessees, but A. was the assignee from C., the original lessee: it was held that this was not a case where a purchaser could claim compensation, nor where he could be forced to take an indemnity.(a)

§ 816. On the same principle that a warranty or a representation is not binding, when made in respect of some *defect that is perfectly patent,(b) the court will not enforce compensation for defects of this nature: so that no compensation was given in respect of a farm described as lying within a ring fence, which did not so lie, as the purchaser had himself seen and knew.(c)

§ 817. But in order that this principle shall apply, the defect must be

(w) *Lachlam v. Reynolds, Kay, 52.* See ante, § 788.

(x) *Ramsden v. Hirst, 4 Jur. N. S. 200,* (Kindersley, V. C.)

(y) *Magennis v. Fallon, 2 Moll. 561, 584.*

(z) *Lord Brooke v. Rounthwaite, 5 Ha. 298.*

(a) *Ridgway v. Gray, 1 M'N. & G. 109.* See also *White v. Cuddon, 8 Cl. & Fin. 766;* *Wilson v. Williams, 3 Jur. N. S. 810,* (Wood, V. C.); and ante, § 303.

(b) See ante, §§ 446, 563.

(c) *Dyer v. Hargrave, 10 Ves. 505.*

perfectly visible to everybody : therefore, where a representation was made as to the dry-rot in a house, which was not a matter so perfectly visible, the court gave compensation : (d) and where a tenant in possession purchased the property, which was represented as 46 feet in depth, whereas it was in fact only 33 feet, he was held entitled to compensation, inasmuch as occupiers are not in the habit of measuring their premises. (e)

§ 818. The ordinary right of a purchaser to insist on performance of the agreement and compensation may of course be excluded by contract. Therefore, where A. agreed to sell to B. certain freehold property, and it was stipulated that if B.'s counsel should be of opinion that a marketable title could not be made at the time appointed for the completion of the purchase, the agreement should be void and be delivered up to be cancelled ; and B.'s counsel was of opinion that a good title could be made only to two-thirds, and that one-third was held for a life only ; the purchaser insisted on specific performance with compensation, but it was refused, because the contract was by its terms void under the circumstances. (f)

§ 819. Inasmuch as the court will not allow any proceedings to be taken at law without its leave, in respect of the subject-matter of the suit, the court will enforce compensation at any time before the completion of the transaction by the execution of the conveyance and [*355] the *payment of all the purchase-money, in respect of any matter, the fit subject of compensation, which has arisen before that time, and whether before or after contract. (g)

§ 820. On this principle, where an estate was sold as tithe free, and after a claim had been started by the incumbent of one parish, the conveyance was executed, but a part of the purchase-money was set aside as an indemnity against this claim : the claim came to nothing, but, before the indemnity fund was transferred, it appeared that the land was in another parish, and was subject to tithe to its incumbent ; it was held on a bill filed by the purchaser that he was entitled to compensation in respect of these tithes out of the fund. (h)

§ 821. But after the complete execution of the contract, the court has no jurisdiction to enforce compensation. (i)

§ 822. Following the principle above stated, the court will allow compensation for deterioration in the estate, between the time when the contract ought to have been completed by the vendor, and the time when he does in fact make out the title, (k) whether it have arisen by the wilful default or merely by the negligence of the vendor or his tenants. (l) Thus, where stone had been subtracted from a quarry pending a suit for the specific performance of an agreement to grant a license to work it, compensation was obtained by means of a supplemental bill. (m)

(d) *Grant v. Munt, Coop.* 173.

(e) *King v. Wilson, 6 Beav.* 124.

(f) *Williams v. Edwards, 2 Sim.* 78.

(g) *Frank v. Basnett, 2 My. & K.* 618 ; *Cann v. Cann, 3 Sim.* 447 ; *Prothero v. Phelps, 25 L. J. Ch.* 105, (L.J.J.) ; cf. *Cator v. Earl of Pembroke, 1 Bro. C. C.* 301 ; *2 Bro. C. C.* 282.

(h) *Crompton v. Lord Melbourne, 5 Sim.* 353.

(i) *Newham v. May, 13 Pri.* 749.

(k) *Binks v. Lord Rokeby, 2 Sw.* 222.

(l) *Foster v. Deacon, 3 Mad.* 394.

(m) *Nelson v. Bridges, 2 Beav.* 239.

The cases in which the vendor and purchaser are respectively liable for deterioration of the estate are considered elsewhere.(n)

§ 823. A condition, stipulating that if through any *mistake [*_356] the estate should be improperly described, or any error or misstatement be inserted in the particular, such error or misstatement should not vitiate the sale, but the vendor or purchaser, as the case might happen, should pay or allow compensation, has been held to cover those cases of innocent mistake where, in the absence of such a condition, the purchaser would be unable to insist on specific performance with compensation, but would be obliged to take the whole as it stood, or to allow the contract to be vacated.(o)

*CHAPTER III.

[_*357]

OF REFERENCE OF TITLE.

§ 824. WHERE the vendor of land sues the purchaser for a specific performance of the contract, the defendant may, in some cases, succeed in having the bill dismissed at the hearing, on the ground of a defect in the plaintiff's title, provided the defect in title has been prominently put forward in the pleadings :(a) but where this is not the case, the defendant is entitled to have an inquiry directed as to the title of the vendor to the lands in question. This right is derived from the extraordinary nature of the jurisdiction which the vendor seeks to put in action, in consideration of which the purchaser has a right not only to have such a title as the vendor offers upon the abstract unauthenticated, but the highest assurance upon the nature of his title which can be acquired for him by the production of deeds, the directing of inquiries, and the sifting of the vendor's conscience.(b)

§ 825. Hence it follows that, though the purchaser may admit that he has only one particular objection,(c) or no objection at all(d) to the title, he is equally entitled to a general reference as to it.

§ 826. The right is so far that of the purchaser that the vendor cannot except to the title, so as to assert his own title to be bad.(e)

*§ 827. Where the purchaser is the plaintiff in a suit for specific performance, he is also entitled to a reference of title ; [*_358] but, inasmuch as it is he, and not the vendor, who is calling on the court to act, he does so at his own risk ; and, therefore, if he knows of objections and asks for a reference, and then waives the objections, he will have to bear the costs of investigating the title.(f) And it would seem that the same result must follow where the effect of a reference is to show that the vendor had at the due time disclosed to the purchaser a perfect title.

(n) See post, § 913. (o) Painter v. Newby, 11 Ha. 26. See also ante, § 706.

(a) Lucas v. James, 7 Ha. 418, 425. (b) Jenkins v. Hiles, 6 Ves. 646.

(c) Lesturgeon v. Martin, 3 My. & K. 255.

(d) Jenkins v. Hiles, 6 Ves. 646; cf. Fleetwood v. Green, 15 Ves. 594.

(e) Bradley v. Munton, 15 Beav. 460. (f) Bennett v. Fowler, 2 Beav. 302.

§ 828. The right to this reference is not confined to sales of real estate, but extends to any species of property with regard to which the court may entertain suits for performance, and the nature of which renders such an inquiry proper. Accordingly, inquiries have been directed into the title of vendors to shares in railway companies,(g) and in mining concerns.(h) The nature of the inquiry, of course, varies according to the nature of the property, and the essentials of a good title to it.

§ 829. But there are necessarily many contracts in respect of which no such inquiry is made: where the contract is not for the sale of any property, such a reference is of course out of the question. And so, too, where a contract is rather in the nature of a compromise of disputed rights than of a contract for sale, the court will not make the inquiry.(i) In a recent case, where a small piece of land was described as held of certain commissioners of waste lands at a rent of six shillings, it was doubted whether a purchaser could call on a vendor for the title of the commissioners.(k)

§ 830. The court will not direct an inquiry where, though the contract be one of sale, the vendor only sells *such interest as he [*359] has :(l) such an agreement is, of course, perfectly valid, but, being in restraint of the purchaser's implied right to a good title, it must be made clear and unambiguous to the purchaser.(m) Of such stipulations there are many cases: thus, where a purchaser agreed to accept the vendor's title without dispute, he was held to be debarred from taking an objection on account of an incumbrance which left the legal state outstanding.(n) So, again, where conditions of sale of a fee-farm rent stated that no evidence should be required of the receipt or payment, or existence of the ground-rent, other than that disclosed by a conveyance mentioned, and that no objection should be taken to the title in consequence of the non-payment or non-receipt of the said rent, and the purchaser objected that the rent had not been paid for twenty years, and so was extinguished, and that there was therefore no subject-matter of the contract, and therefore no contract: the court held that the purchaser had by the contract taken on himself the chance of being able to substantiate his claim to the rent.(o) A vendor may, of course, stipulate that a purchaser shall take such title as he himself bought with.(p)

§ 831. Where the vendor was entitled to one undivided third in a leasehold interest in certain collieries, and the purchaser to another undivided third under the same title, and the contract was for an assignment of the vendor's share and interest in the collieries: the contract was held

(g) *Shaw v. Fisher*, 2 De G. & Sm. 11.

(h) *Curling v. Flight*, 2 Phil. 613.

(i) *Godson v. Turner*, 15 Beav. 46.

(k) *Ashton v. Wood*, 3 Jur. N. S. 1164, (Stuart, V. C.)

(l) See ante, § 571.

(m) *Southby v. Hutt*, 2 My. & Cr. 207, 212. See also *Anderson v. Higgins*, 1 Jon. & L. 718.

(n) *Duke v. Barnett*, 2 C. C. C. 337; *Wilmot v. Wilkinson*, 6 B. & C. 506.

(o) *Hanks v. Palling*, 6 Ell. & Bl. 659; cf. *Smith v. Harrison*, 26 L. J. Ch. 412, stated ante, § 237.

(p) *Monro v. Taylor*, 8 Ha. 51, 71.

to be for the sale of the vendor's share and not of the land, and the vendor was held not liable to show the lessor's title.(q)

§ 832. The vendor may by express stipulation, as we *have seen, entirely exclude any inquiry into his title: he may take a [*360] middle course, and, without excluding, may limit that inquiry. He may exclude all objections in respect of a particular instrument,(r) or all objections to title earlier than a certain deed,(s) or he may sell merely an equitable and not a legal estate.(t) In all cases where an estate is sold subject to conditions of sale as to title, the inquiry is whether a good title is made in accordance with such conditions. And where A. contracted with B. for a lease, B. knowing the purposes for which A. wanted the house, and A. knowing that B.'s title was merely leaseshold, a reference was directed, having regard to the covenants in the lease, and the purposes for which the premises were taken.(u)

§ 833. A very common case, in respect of which the question arises whether the inquiry has been limited or not, is in respect of a lessor's title in contracts to assign a lease, or to grant an under-lease.(v) The cases on this subject fall into two categories: the first, where it is stipulated only that the lessor's title shall not be produced, which relieves the vendor from the necessity of production, but does not prevent the purchaser from showing, by any means in his own power, that the vendor's title is defective: the second class of cases are those where, in addition to such a stipulation, it is also provided that the lessor's title shall not be inquired into, which altogether precludes inquiry for every purpose into that portion of the title, and compels the purchaser to take it as it is.

§ 834. Of the first of these classes an illustration may be found in the case of *Darlington v. Hamilton*,(w) where there *was a stipulation that the lessor's title should not be produced, and the purchaser discovered that the lessor's title was objectionable by reason of its being involved with the title to other property, so that the purchaser would run the risk of being ousted by reason of a breach of covenant in respect of other property, and the court accordingly refused specific performance.

§ 835. On the other hand, where the condition provided that the lessor's title should neither be produced nor inquired into, and the purchaser offered acts of parliament in evidence that the lessor, which was a public company, had no power to grant leases, the objection was held to be precluded.(x)

§ 836. The case of *Spratt v. Jeffery*,(y) which is at variance with the

(q) *Phipps v. Child*, 3 Drew, 709.

(r) *Corrall v. Cattell*, 4 M. & W. 734; S. C. 3 Y. & C. Ex. 413.

(s) *Taylor v. Martindale*, 1 Y. & C. C. C. 658.

(t) *Ashworth v. Mounsey*, 9 Ex. 175.

(u) *Wilbraham v. Livesey*, 18 Beav. 206. For the form of reference where the vendor has a power of sale with the consent of trustees, see *Graham v. Oliver*, 3 Beav. 124.

(v) As to waiver of this right, *infra*, § 855.

(w) *Kay*, 550; *Shepherd v. Keatley*, 1 Cr. M. & R. 117.

(x) *Hume v. Bentley*, 5 De G & Sm. 520.

(y) 10 B. & C. 249.

distinction above stated, must now be considered as overruled ; for, in that case, words which merely excluded the purchaser from calling for the lessor's title, were held to preclude any objection being taken to that title.

§ 837. We have seen that, generally, either vendor or purchaser has a right to the inquiry in question,—the one being entitled to an opportunity of perfecting, and the other of investigating the title. But with regard to either, this right may be waived.

§ 838. Thus, if the vendor states his title, and conclusively avers that he can make no other or better title, and the title disclosed is objected to by the purchaser, the court may decide without a reference ;^(z) but if the decision be in favour of the vendor, it would then appear that the purchaser would be entitled to call for a reference.

[*362] § 839. But it is with regard to a waiver by the purchaser *that this question more often arises ; for a purchaser originally entitled to examine the vendor's title may subsequently waive that right either expressly or by implication ; and this waiver may be either as to the whole title or limited to parts : and in case of an express waiver, it may be either absolute or conditional.^(a)

§ 840. An admission of title by a defendant in his answer is an express waiver, which excludes the right to a reference of title : for this purpose it is enough that the defendant admits as to his belief that at the time of the contract the plaintiff had a title ; for, by the rule of pleading, what a defendant admits as to his belief is treated as an admission of the fact.^(b)

§ 841. This waiver, where not express, must be clearly implied from the acts of the purchaser. "The court," said Lord Eldon,^(c) "will at least take care that, where it is contended that the defendant has waived his right to a reference, it shall be clear that there was no surprise upon him, and that there has been a full and fair representation as to the title on the part of the plaintiff :" and so where the purchaser relies on any dealings in respect of the abstract as a waiver of objections to title, the contents of the abstract must raise the objection in question clearly and explicitly, and not merely by inference or notice.^(d)

§ 842. It is often the case that there is only a particular objection to the title that is of moment, and it is then frequently a question whether the purchaser has not waived all right to object to it.

§ 843. The cases thus fall into three classes : (1) those of acts done by the purchaser after the objection is known to him, the objection being in its nature curable ; (2) those of similar acts where the defect is [*363] incurable ; (3) and *those of acts before the objection is known to the purchaser. It is evident that under the last we may treat of the question of a general waiver of title.

(z) *Rose v. Calland*, 5 Ves. 186; *Omerod v. Hardman*, 5 Ves. 722, explained in *Jenkins v. Hiles*, 6 Ves. 654, 655.

(a) *Townley v. Bond*, 2 Dr. & W. 240, 261.

(b) *Phipps v. Child*, 3 Drew, 709.

(c) In *Jenkins v. Hiles*, 6 Ves. 655; *Haydon v. Bell*, 1 Beav. 337.

(d) *Blacklow v. Laws*, 2 Ha. 40.

§ 844. (1) Where the defect, though known, is yet one which it is or may be in the power of the vendor to remedy, acts which indicate an intention to complete may yet not amount to a waiver, because they may be made in the faith and expectation that the remedy will be applied.

§ 845. And a negotiation about the objection between the parties after the acts, is on this principle an evidence that it was not waived.(e)

§ 846. (2) But where the defect is known to the purchaser, and is in its nature incurable, there no such expectation can arise, and much slighter acts will operate as indications of an intention to waive the objection. So where an estate, sold as freehold and leaseholds attached, turned out to be nearly all leasehold, and this clearly appeared as a defect which could not be cured, and the purchaser continued to treat, up to and long after the day for concluding the purchase, on points of title irrespective of this objection: he was held to have waived it.(f) So where an estate was subject as to part to a reservation of rights of sporting which appeared on the abstract, and which the vendor could not cure, and after the delivery of the abstract the purchaser took possession: he was held to have waived his right to object to the reservation in question.(g) And where the invalidity of a fiat on which the title depended was known to the purchaser, his granting a lease of the property was held a waiver.(h) Again, where the defect alleged was an erroneous and misleading description of the situation of a house, proceeding to investigate the title after *this was known, waived all objection on the score of misdescription.(i) [*_364]

§ 847. So with regard to the contract itself,—if the defendant contends that it is a nullity, and after having become aware of the facts on which he relies for this contention, has gone on acting as though there were a subsisting contract, he will be estopped from subsequently taking the objection.(k)

§ 848. Where either by the terms of the original contract, or by a subsequent arrangement, it is agreed that the purchaser shall take possession and shall be entitled to a good title, no waiver is worked by the possession or by any acts which do not go beyond the acts of a person entrusted with the possession and bound to take care of the estate. So when a person purchased a share in some iron-works to which a good title was to be made in about a year, and it appeared to be the intention of both parties that the purchaser should previously take possession and act as partuer, his doing so was no waiver of his right to a good title.(l)

§ 849. In *Burroughs v. Oakley*,(m) the original contract was silent as to possession, but possession having been taken by the purchaser, and both parties having for more than a year subsequently continued negoti-

(e) *Calcraft v. Roebuck*, 1 Ves. Jun. 221.

(f) *Fordyce v. Ford*, 4 Bro. C. C. 494; S. C. 6 Ves. 679.

(g) *Burnell v. Brown*, 1 J. & W. 168.

(h) *Ex parte Sidebotham*, 1 Mont. & Ayr. 655; *Ex parte Barrington*, 2 Mont. & Ayr. 245.

(i) *Stanton v. Tattersall*, 1 Sm. & G. 529.

(k) *Flint v. Woodin*, 9 Ha. 618; *Campbell v. Fleming*, 1 A. & E. 40.

(l) *Stevens v. Guppy*, 3 Russ. 171; *Margravine of Anspach v. Noel*, 1 Mad. 310, 315. (m) 3 Sw. 159.

tiating as to title, Sir Thomas Plumer concluded that possession was prematurely taken with the consent of both parties, but without an intention of waiving the investigation of title.

§ 850. (3) Acts of ownership on the part of a purchaser may amount, in the contemplation of the court, to a declaration that he considers himself as the owner of the property, and then they work an acceptance of title and a waiver of all objections: or secondly, such acts, though falling short of *this, may yet, by changing the property which [*365] is subject to the vendor's lien, affect that security, and therefore furnish a motive to the court to order the payment into court of the purchase-money.(n)

§ 851. It is obvious that for acts to amount to the waiver of an objection before it is known, they must be very strong and distinct,(o)—such acts, in short, as are equivalent to a declaration by the purchaser that he has taken the estate at all possible risks, and considers himself as the absolute and unconditional owner of it, and so preclude any investigation of title at all. Therefore in a case where the objections were not known, the stubbing up of an osier-bed and filling up a pond, though held to justify an order for payment of the purchase-money into court, and for a receiver, were not held to amount to a waiver of title.(p)

§ 852. Leaving the abstract unobjected to for two years, altering the property, letting it, and apologizing for not paying the purchase-money, which was of course only payable if the title was accepted, were considered strong acts of waiver.(q) And where the purchaser was in possession twenty years, and after making frivolous objections and refusing any further explanation of them, still continued in possession, the right to investigate title was held to have been waived.(r) Again, the like was held in a case where a purchaser continued twenty-six years in possession after his requisitions of title were sent in, and had paid a considerable part of his purchase-money and made alterations.(s) In another case, the master of the rolls expressed an opinion that the purchaser's having retained the abstract for five months and made no objections to the title, [*366] but simply got *the vendor to verify the abstract with the title-deeds, was a waiver as to title.(t)

§ 853. The right of investigation may sometimes be waived by the silence of a subsequent agreement concerning it. Thus where by an agreement for the sale of an estate, the purchaser was entitled to evidence that the buildings were not on the copyhold part of the property, which except to that extent, the vendor was not to be called on to distinguish from the freehold; the purchaser asked for evidence of the identity of the parcels in the abstract with the estate sold: subsequently, by a supplemental agreement, the purchaser accepted the title, subject to the production of a declaration of the identity of the parcels in the deeds and the lands sold,—which was produced and approved on the

(n) Cutler v. Simons, 2 Mer. 103. (o) Dixon v. Astley, 1 Mer. 133.

(p) Osborne v. Harvey, 1 Y. & C. C. 116; Small v. Attwood, You. 506.

(q) Margravine of Anspach v. Noel, 1 Mad. 310.

(r) Hall v. Laver, 3 Y. & C. Ex. 191.

(s) Wallis v. Goodyear, 2 Jur. N. S. 179, (Wood, V. C.)

(t) Pegg v. Wisden, 16 Beav. 239.

purchaser's behalf: and he subsequently objected that the buildings were on the copyhold part of the estate: it was held that this term of the original agreement had been waived by the silence on that head of the supplemental one.(u)

§ 854. On the other hand, the mere acquiescence of both parties in not enforcing the completion of the contract,(v) the continuing a treaty and at the same time insisting on the objection,(w) and the approval of the title by the purchaser's counsel,(x) have all been held insufficient to waive the purchaser's right to investigate the title of the vendor.

§ 855. Conduct may waive the right of the purchaser of a lease to inquire into the title of the lessor, which does not waive the right as to the title of the lessee.

§ 856. So where B. contracted with A. to take an assignment of a lease when executed, and inspected the lease and the assignment of it to A., and subsequently directed A. to cause an assignment to himself to be endorsed *totidem verbis*, he was held to be precluded from calling for the lessor's title.(y) And again, where a purchaser [367] after transmission to him of the original lease, prepared a draft assignment, and made various objections as to repairs and other matters, but did not require the production of the lessor's title, it seems that he would have been held to have waived the rights, but the point was not decided.(z)

§ 857. In a recent case, Lord Cranworth, affirming a decision of Vice-Chancellor Stuart, held that joining in a valuation, advertising the property to be disposed of, and other like acts on the part of the lessee, which implied that nothing remained to be done but the execution of the lease amounted to a waiver of his right to call for the lessor's title.(a)

§ 858. In analogy with the distinction established by these cases on conditions of sale as to the lessor's title, it is established that acts may amount to a waiver of a right to investigate the title, and yet not compel the purchaser to take it if it come out collaterally that the vendor has no title. Thus in Warren v. Richardson,(b) the purchaser of a leasehold interest had done acts which the court, at the hearing held to be a waiver of the right to investigate the title; but it appearing on the report of the master, to whom it was referred to settle the lease and to state any special circumstances, that the vendor held this together with other leasehold property under one lease, and subject to one proviso for re-entry, so that the vendor, who was plaintiff, could not make a good title: the court refused to enforce the completion of the contract on the defendant.

§ 859. With regard to the proper mode of pleading that the right to

(u) Dawson v. Brinckman, 3 De G. & Sm. 376; S. C. 3 M^oN. & G. 53.

(v) Blachford v. Kirkpatrick, 6 Beav. 232.

(w) Knatchbull v. Grueber, 1 Mad. 153.

(x) Deverell v. Lord Bolton, 18 Ves. 505.

(y) Smith v. Capron, 7 Ha. 185, 189.

(z) Clive v. Beaumont, 1 De G. & Sm. 397.

(a) Simpson v. Sadd, 4 De G. M. & G. 665, which see for the form of a declaration that the right to call for the lessor's title has been waived. See also Ogilvie v. Foljambe, 3 Mer. 66.

(b) You. 1.

investigate the title has been waived, it has been decided that it is not enough for the party relying on such *waiver to allege facts from [*368] which it is a legal inference; but he must allege the facts and that there has thereby been such waiver. This was decided by Sir J. L. Knight Bruce, then vice-chancellor, in Clive v. Beaumont,(c) on the ground that though, as a general principle, it is not the office of pleading to state inferences of law, yet that where facts are relied on to rebut a right given by law as a necessary result of the contract, the person whose rights are thus sought to be excluded is entitled to have his attention called to it by a distinct allegation.

§ 860. The inquiry as to title may be directed by the court, (1) at the hearing, or (2) on motion before the hearing, but after answer, or (3) before the answer. The practice of allowing this inquiry on motion was introduced by Lord Thurlow.(d)

§ 861. Where an inquiry as to title alone is directed at the hearing, it will be taken as excluding all other questions than that of title, so that the court will not on further directions enter into any other question set up as a defence by the answer.(e)

§ 862. This inquiry may be directed before the hearing, where the defendant having answered, there is no other question on the record but simply that of title; or there being such other question, the objection on that score is removed by consent.(f) Where other questions are raised, but the court on looking into the answer sees that they are merely frivolous, and entirely unworthy of argument, it will treat them as no questions at all, and order the inquiry as if they had not been raised.(g)

[*369] But unless they are thus *merely frivolous, even though the contention may be such as the court judges unlikely to succeed, the indulgence of an inquiry before the hearing will not be granted.(h)

§ 863. Accordingly, such references have been refused where there was a claim for compensation,(i) even though the defendant submitted to complete his agreement,(k) where *laches* were insisted on as a defence,(l) where there was a question as to the production of a lessor's title,(m) and where there was a question whether there was any subsisting contract.(n)

§ 864. By questions of title are meant those which can only properly become the subject of adjudication upon the investigation of the title, although they may not arise on the abstract taken by itself; so that where the validity of the conditions of sale being admitted, the question

(c) 1 De G. & Sm. 397; Gaston v. Frankum, 2 De G. & Sm. 561.

(d) 1 Sw. 551, n.; —— v. Skelton, 1 Ves. & B. 517; Eldridge v. Porter, 14 Ves. 123. See also Briscoe v. Brett, 2 V. & B. 377.

(e) Le Grand v. Whitehead, 1 Russ. 309.

(f) Blyth v. Elmhirst, 1 V. & B. 1; Paton v. Rogers, 1 V. & B. 351; Moss v. Matthews, 3 Ves. 279; Wright v. Bond, 11 Ves. 39.

(g) Withy v. Cottle, T. & R. 78; Boehm v. Wood, 1 J. & W. 419; Boyes v. Liddell, 1 Y. & C. C. C. 133; Wood v. Machu, 5 Ha. 158.

(h) Withy v. Cottle, 1 S. & S. 174; Gordon v. Ball, 1 S. & S. 178; Portman v. Mill, 2 Russ. 570.

(i) Paton v. Rogers, 1 V. & B. 351.

(k) Lowe v. Manners, 1 Mer. 19.

(l) Blyth v. Elmhirst, 1 V. & B. 1.

(m) Gompertz v. ——, 12 Ves. 17.

(n) Morgan v. Shaw, 2 Mer. 138.

was as to the application of them, the question was held to be one of title.(o)

§ 865. Where the circumstances are such as before stated, to justify this inquiry on motion, the court will make it on such an application, even though the question in dispute may be one which could be conveniently disposed of at the hearing without a reference.(p)

§ 866. An inquiry as to title may also be made on motion before answer, where the vendor, being plaintiff, undertakes to do all such acts for the purpose of executing what the court shall think right, as if the answer had been put in,(q) and it being admitted at the bar that there is no other question than that of title.(r) Where such an admission is not made, the motion will be refused.(s) Nevertheless in one case,(t) the vice-chancellor of England held that after such *a reference [*370] the defendant might by his answer, which was called for by the plaintiff, make any defence he pleased, and was not confined to the question of title. "It does not appear," said the vice-chancellor, "on the face of the order of reference, that the defendant did not object to the order being made, or that he said that there was no objection to a specific performance except the objection as to title." It seems therefore that the order should be prefaced with such a declaration.

§ 867. No alteration is effected in this practice by the 5th of the general orders of the 9th May, 1839.(u)

§ 868. The order for reference is not now strictly confined to an inquiry whether a good title had been made, but may extend to all that regards the title, but not to other matters.(v) Therefore it should include an inquiry as to the time at which a good title was shown,(w) at least in cases where the question of title is the only one in dispute, for in other cases this inquiry is omitted.(x) The old practice on this point was somewhat variable,(y) but the present course is as above stated. As this inquiry, if to be made at all, should be directed at the original reference, the court will not make it subsequently on a second motion.(z)

§ 869. On the same principle the inquiry may extend to whether it appeared by the abstract that a good title could be made.(a)

§ 870. And on the like ground, an inquiry was added whether the defendant objected at any time to the want of evidence as to the identity of the premises; but an inquiry whether the abstract was perfect, and if deficient, in what respects, and whether it was ever perfected, was considered *not so connected with the title as to be added to the re-[*371]ference.(b)

§ 871. The inquiry is whether the vendor can make a good title, not

(o) *Wood v. Machu*, 5 Ha. 158. (p) *Curling v. Flight*, 5 Ha. 244, 248.

(q) *Balmano v. Lumley*, 1 V. & B. 224. (s) *Matthews v. Dana*, 3 Mad. 470.

(r) *Per Lord Eldon*, in 1 Mer. 372. (t) *Emery v. Pickering*, 13 Sim. 583.

(u) *Boyes v. Liddell*, 1 Y. & C. C. C. 133. (w) *Seton on Decrees*, 244.

(v) *Jennings v. Hopton*, 1 Mad. 211. (x) *Gibbins v. Northeastern Metropolitan District Asylum*, 11 Beav. 1.

(y) *Moss v. Matthews*, 3 Ves. 279; *Gibson v. Clarke*, 2 V. & B. 103.

(z) *Hyde v. Wroughton*, 3 Mad. 279. (a) *Jennings v. Hopton*, 1 Mad. 211.

(b) *Bennett v. Rees*, 1 Ke. 405.

whether he could do so at the date of the contract; and therefore he may make out his title at any time before the report, and if he can do so he will be entitled to a decree,(c) at least where there has been no unreasonable delay, and time is not material.(d)

§ 872. Accordingly, the court often allows time for the completion of the title: so in an old case, the court more than once allowed the vendor time to get an act of parliament ;(e) and in a recent case, where upon the face of the contract it appeared that there was a difficulty in the plaintiff's title, Vice-Chancellor Wood refused on demurrer to stop a suit for specific performance, on the ground that the act of parliament contemplated had not been obtained.(f) So in another case, the court allowed the vendor time to procure a small part of the estate ;(g) and in another case, allowed a limited time to procure the concurrence of an assignee in insolvency.(h)

§ 873. The court grants indulgence in point of time for the getting over any difficulties in matters of conveyance, as much where the vendor is the plaintiff, as where the suit is instituted by the purchaser.(i)

§ 874. But this indulgence will not be granted where the defect to be remedied was known to the vendor or his agent, and was concealed from [*372] the purchaser :(k) nor where *there has been great delay, and there is no probable chance of the difficulty being got over in a short time ;(l) so that a purchaser under the court would be discharged if it appeared requisite to his title that an account should first be taken in a suit to be instituted,(m) or that a suit should be instituted to try whether certain devisees were trustees for the seller or not.(n)

§ 875. Nor will it grant additional time where the vendor proposes not to cure a defect in the title which he had at the sale, or to produce fresh evidence in support of it, but to get an entirely new title: for the court will not force a buyer to take an estate from a vendor who is neither owner of it nor possessed of the power by the ordinary course of law or equity to make himself so,(o) for it is not the purpose of the court to enable one man to sell another man's estate.(p) As to this point, it has been decided that a title from possession defeasible by the crown on account of the alienage of the original owner, cured by a grant from the crown whilst the question was in the master's office, was the same title, and the purchaser was compelled to take it.(q) And the fact that the vendor may have had no title to a small part of the estate at the time of

(c) *Bennet College v. Carey*, 3 Bro. C. C. 390; *Wynn v. Morgan*, 7 Ves. 202; *Mortlock v. Buller*, 10 Ves. 292, 315; *Vancouver v. Bliss*, 11 Ves. 458.

(d) *Langford v. Pitt*, 2 P. Wms. 629.

(e) *Lord Stourton v. Meers*, cited 2 P. Wms. 630. See also *Lord Braybroke v. Inskip*, 8 Ves. 417, 436; *Coffin v. Cooper*, 14 Ves. 205.

(f) *Devenish v. Brown*, 26 L. J. Ch. 23, (Wood, V. C.)

(g) *Chamberlain v. Lee*, 10 Sim. 444.

(h) *Sidebotham v. Barrington*, 4 Beav. 110.

(i) *Duke of Beaufort v. Glynn*, 3 Sm. & G. 213.

(k) *Dalby v. Pullen*, 3 Sim. 29; S. C. 1 R. & My. 296.

(l) *Fraser v. Wood*, 8 Beav. 339. (m) *Magennis v. Fallon*, 2 Moll. 561.

(n) *Noel v. Hoy*, Sug. Vend. 293.

(o) *Tendring v. London*, 2 Eq. Cas. Abr. 680, pl. 9; *Magennis v. Fallon*, 2 Moll. 561. (p) *Chamberlain v. Lee*, 10 Sim. 444.

(q) *Eyston v. Simmons*, 1 Y. & C. C. 608.

sale, and subsequently purchases it, will not make the title a new one within this rule.(r)

§ 876. But even where the vendor has no title at all at the time of sale, so that the purchaser may withdraw if he choose, yet if he acquiesce in steps taken by the vendor to get in the estate, he will thereby have waived the want of mutuality, and be bound to accept the title if made out at the hearing.(s)

*§ 877. The master's report, and now the certificate, should, [*_373] it seems, be on the fact of title aye or no: and accordingly it is improper to report that a defendant with the concurrence of a third party could make a good title,(t) or that he could do so subject to the performance of certain conditions.(u)

§ 878. Where the report is in favour of the title, but the court thinks it too doubtful to force on a purchaser, the court may dismiss the bill without allowing the exceptions,(v) and either with(w) or without costs,(x) as the court may think right.

§ 879. If exceptions to a report of good title are overruled, no other objections to the title can be made: but if the exceptions are allowed and a new abstract delivered, further objections may be brought in.(y)

§ 880. The court referred back the question of title where the master was satisfied with evidence of a fact with which the court was not satisfied, the vendor offering to produce further evidence;(z) also, where by expressing an opinion in favour of some part of the title, the master had prevented the vendor from showing that the title was good, even supposing that part not to be so.(a)

§ 881. A reference back may be made without a fresh motion, on the hearing of exceptions, whether the original reference was made on motion or by decree.(b)

* 882. Even where the report was against the title and the defect was cured at the hearing on further directions, the court compelled specific performance,(c) but without giving time for further proceedings: but if there was a *question whether the defect was in part cured, the [*_374] court would refer it back to the master to review his report with the additional circumstances.(d)

§ 883. In the inquiry as to the time when a good title was shown is involved the question, what is showing a good title. In relation to this, two distinctions are to be borne in mind, the one between questions of title and of conveyance, the other between questions of title and of evidence.

(r) Chamberlain v. Lee, 10 Sim. 444.

(s) Hoggart v. Scott, 1 R. & My. 293; Salisbury v. Hatcher, 2 Y. & C. C. C. 54. See ante, § 293.

(t) Lewis v. Loxam, 1 Mer. 179.

(u) Magennis v. Fallon, 2 Moll. 561, 575, 583.

(v) Bickner v. Milner, 1 Ha. 578, n.

(w) S. C.

(x) Wilcox v. Bellairs, T. & R. 491.

(y) Brooke v. ——, 4 Mad. 212.

(z) Andrew v. Andrew, 3 Sim. 390.

(a) Egerton v. Jones, 3 Sim. 392; S. C. 1 R. & My. 694; Portman v. Mill, 1 R. & My. 696; Fildes v. Hooker, 2 Mer. 424. See also Jeudwine v. Alcock, 1 Mad. 597.

(b) Curling v. Flight, 2 Phil. 613.

(c) Paton v. Rogers. 6 Mad. 256.

(d) Esdaile v. Stephenson, 6 Mad. 366.

§ 884. As to the first, the rule was thus stated by Lord Eldon in *Lord Braybroke v. Inskip*,(e)—"As to the question whether the abstract was complete, the abstract is complete whenever it appears that upon certain acts done, the legal and equitable estates will be in the purchaser. That may be long before the title can be completed." So that a good title is shown when it appears from the abstract that the vendor has the whole equity, and in what persons the outstanding portion of the legal estate is vested.(f) The acts to be done, of which Lord Eldon speaks, must be confined to acts the performance of which the vendor can enforce in a court of justice, as, for instance, by calling on a trustee to convey the estate vested in him. Therefore, where an estate tail was outstanding in a person who had consented to bar it, but was not in any way a trustee for the vendor, the court held that the title was not made out till the recovery had been fully perfected.(g)

§ 885. In *Esdaile v. Stephenson*,(h) Sir John Leach, after consultation with the lord chancellor, laid down the rule, "that where a necessary party to the title was neither in law nor equity under the control of the vendor, but had an independent interest, unless there was produced to the master a legal or equitable obligation on the part of the stranger to [375] join in the sale, the master ought to report *against the title; otherwise, where a necessary party to the title was under the legal or equitable control of the vendor as a mortgagee, where the master might well report that upon payment of the mortgage a good title could be made."

§ 886. The rule is further illustrated by other cases. In one,(i) it was held to be no objection to title, that a satisfied term was outstanding in a lunatic against whom no commission had issued, so that there was then no person competent to make the assignment: and in another case,(k) the legal estate of a moiety of the property was outstanding in a married woman or those claiming under her, but she being under the order of the court to convey was bound by it, and became absolutely a trustee for the purchaser under the order of the court: the title was therefore held good, but without prejudice as to the question of conveyance.

§ 887. It appears to have been considered by Sir L. Shadwell to be sufficient if the abstract showed that the outstanding legal estate had been formerly vested in a trustee for the vendor, and that the abstract was then complete, though a supplemental abstract was necessary to trace the legal estate.(l) But this decision seems at variance with the rule enunciated by him in the same case, of which one condition is that the abstract must disclose in whom the legal estate is vested, not in whom it was formerly vested. And accordingly, Lord Gifford held that where an abstract only showed that the legal estate had long since been vested in persons who would be trustees for the vendor, but did not show in whom the legal estate was then vested, the defect was one of title and not of conveyance.(m)

(e) 8 Ves. 436.

(f) *Avarne v. Brown*, 14 Sim. 303.

(h) 6 Mad. 366.

(k) *Jumpson v. Pitcher*, 1 Coll. C. C. 13.

(m) *Wynne v. Griffith*, 1 Russ. 283. See further as to what is a perfect abstract, per Wigram, V. C., in *Morley v. Cook*, 2 Ha. 111.

(g) *Lewin v. Guest*, 1 Russ. 325.

(i) *Berkeley v. Dauh*, 16 Ves. 380.

(l) *Avarne v. Brown*, 14 Sim. 303.

§ 888. It is evident further that there is a distinction *to be drawn between matters of title and of the evidence whereby that title is supported. The verification of the abstract may be either the one or the other; thus, the verification of the deeds stated in the abstract is matter of evidence; whilst on the other hand, the proof of a fact essential to the title which can only be proved by evidence documentary or oral,—as, for example, the identity of a person or of parcels apparently different on the deeds,—is a matter of title.(n)

*CHAPTER IV.

[*377]

OF INTEREST, RENTS, DETERIORATION, AND PAYMENT INTO COURT.

§ 889. THE result in equity of a contract of sale, is that the thing sold thereupon becomes the property of the purchaser, and the purchase-money the property of the vendor; whence it follows that the purchaser is entitled to the rents of the estate from the time fixed for completion, and the vendor is entitled to interest on the purchase-money from the same time.(a) In a word, the estate and the purchase-money are things mutually exclusive, and neither party can at the same time be entitled to the enjoyment of both.

§ 890. The most convenient plan of considering the rather complicated questions which arise in respect of the rights of the vendor and purchaser to the interest on the purchase-money and the rents of the estate respectively, and also in respect of any deterioration happening to the estate, will be to consider them under the following circumstances:—
 (1) Where the vendor is in receipt of the rents and profits, and the purchase-money remains unpaid in whole or in part. (2) Where the vendor is in the actual enjoyment of the estate, whether the purchase-money be or be not paid. (3) Where the purchaser is in possession, and the purchase-money remains unpaid in whole or in part.

§ 891. (1) *Prima facie*, and in the absence of stipulation, [*378] the time fixed for the completion of the contract is the time from which the purchaser is entitled to the rents and is liable to the payment of interest. But this is liable to exceptions.

§ 892. Where the interest is much more in amount than the rents and profits, and the delay in completion is clearly made out to have been occasioned by the vendor, the court, to prevent the vendor from gaining an advantage by his own wrong, gives him no interest, but leaves him in possession of the interim rents.(b) In such cases, the day at which the interchange of properties is treated as taking place, is removed from the time fixed for completion to the time at which a good title is first shown.(c)

(n) Sherwin v. Shakespeare, 17 Beav. 267, 275.

(a) See Inst. iii. 24, 3. (b) Esdaile v. Stephenson, 1 S. & S. 122.

(c) Jones v. Mudd, 4 Russ. 118; Paton v. Rogers, 6 Mad. 236. It seems pre-

§ 893. In a case(*d*) where a vendor had retained possession of the whole of the estate and of one-third of the purchase-money for fifteen years, and the delay was wholly due to his wrongful conduct, Sir Thomas Plumer, not feeling himself justified in removing the time for the interchange of properties from the time fixed for completion, endeavoured to meet the equity of the case by giving the purchaser the whole of the rents and interest on one-third of the rents in each year from the time of their accruing.

§ 894. Again, where the title is made out in the master's office, or now in chambers, the day when the title is made out is the day on which the purchaser is bound to complete. Hence, up to that day the vendor is entitled to the rents, and the purchaser to interest on the deposit paid to the vendor; and from that day the purchaser takes the rents and pays the vendor interest on the unpaid balance of the purchase-money.(*e*)

[*379] *§ 895. And so where a suit was instituted for the specific performance of a contract to buy a mill, and the decree was made in February, 1854, but a good title was not shown till December of that year, and a question arose as to who was to bear the expenses and outgoings belonging to the mill, and to the repairs and sustentation of the premises and the machinery, Sir John Romilly decided that these must be borne by the vendor up to the time at which a purchaser could prudently take possession, which is the time at which a good title is shown, and after that by the purchaser.(*f*)

§ 896. Where, however, the title has not been made out till after suit, but the delay has arisen from the purchaser's raising other points which made the suit necessary, then the delay not being the fault of the vendor, interest will run from the day fixed for completion.(*g*)

§ 897. Further, the general principle may be excluded by express stipulation, as where the conditions of sale reserved the rents to the vendor, which was held to exonerate the purchaser from the payment of interest on the unpaid purchase-money.(*h*)

§ 898. Though, as we have seen, the purchaser is *prima facie* obliged to pay interest on the unpaid purchase-money, he is discharged from this liability where the purchase-money has been appropriated by him and has been unproductive, and notice to this effect has been given by the purchaser to the vendor.(*i*) "Where nothing appears to occasion the delay," said Lord Cottenham,(*k*) "the rule no doubt is, that if the purchaser, who on the face of the *contract is under the necessity of paying on a certain day, sets apart his money, and gives notice that it is ready, interest stops from that time, provided it be

viously to have been held that interest necessarily ran from the date for completion. See *Wilson v. Clapham*, 1 J. & W. 36; per Sir T. Plumer, in *Burton v. Todd*, 1 Sw. 260.

(*d*) *Burton v. Todd*, 1 Sw. 255.

(*e*) *Pincke v. Curteis*, 4 Bro. C. C. 333; *Enraght v. Fitzgerald*, 2 Dr. & W. 43.

(*f*) *Carrodus v. Sharp*, 20 Beav. 56.

(*g*) *Monro v. Taylor*, 3 M.N. & G. 713.

(*h*) *Brooke v. Champernowne*, 4 Cl. & Fin. 589, 611.

(*i*) *Powell v. Martyr*, 8 Ves. 146; *Roberts v. Massey*, 13 Ves. 561; *Dyson v. Hornby*, 4 De G. & Sm. 481; *Howland v. Norris*, 1 Cox, 59; *Regent's Canal Company v. Ware*, 23 Beav. 575.

(*k*) In *De Visme v. De Visme*, 1 M.N. & G. 352.

shown that he made no interest of it." And even in contracts by railway companies taking land under their compulsory powers, where the owner makes default in completing the sale, interest will cease upon an appropriation of the purchase-money, with notice that it is unemployed.(l)

§ 899. Where the purchaser makes any profit on any part of the appropriated purchase-money, he is discharged from the payment of interest only in respect of the purchase-money on which he has made no interest. Thus where a purchaser, on entering into possession, paid the money into his banker's, and gave the vendor notice that he was ready to invest in such manner as the vendor should require; and during the investigation of the title he kept a balance at his banker's equal to the purchase-money, except on four days, when it was a little less: the vice-chancellor said it was clear that the purchaser had made some profit with the money, "first, because his balance was in a small degree and for a few days reduced below the amount of the purchase-money, but principally because the purchase-money supplied the place of that balance which he must otherwise have maintained at his banker's:" he therefore directed an inquiry as to the average balance which the purchaser had maintained at his banker's for the three years preceding the purchase, and the average balance during the period of the investigation of the title, and declared that in respect of the difference between those balances he was not chargeable with interest on his purchase-money.(m)

§ 900. Where conditions of sale stipulate for the payment of interest by the purchaser from the day appointed for completion, from whatever cause the delay may arise, *it was formerly held that the fact [*381] that the delay arose on the part of the vendor did not excuse the purchaser from the terms of the conditions, and that accordingly he was bound to pay interest:(n) and in a case(o) where conditions of sale, under the court, stipulated for payment of the purchase-money on a certain day, and if from any cause whatever it should not then be paid, that interest should be paid at £5 per cent.; and there was great difficulty and delay on the vendor's part, and the purchaser had entered into possession, Lord Langdale ordered the payment of interest according to the contract, but without prejudice to any application for compensation.

§ 901. On the other hand, in a case(p) where there was a stipulation that if, by reason of any unforeseen or unavoidable obstacles, the purchase should not be completed by the day fixed, the purchaser should from that day pay interest at £5 per cent. on his purchase-money and be entitled to the rents, and the vendor did not show a good title till long after the specified day, Sir J. Leach held that the general rule applied, and that the stipulation would not make interest run before the completion of the title, but only affect its rate. And in the case of *De Visme v. De Visme*,(q) where the effect of such conditions was very elaborately

(l) *Regent's Canal Company v. Ware*, 23 Beav. 575.

(m) *Winter v. Blades*, 2 S. & S. 393.

(n) *Esdale v. Stephenson*, 1 S. & S. 122, and see Lord St. Leonards' observations on this point, *Vend.* 529, et seq.

(o) *Greenwood v. Churchill*, 8 Beav. 413.

(p) *Monk v. Huskisson*, 4 Russ. 121, n.

(q) 1 M.N. & G. 336.

considered by Lord Cottenham, his lordship held that a clause for payment of interest from the day appointed for completion in case of delay, from whatever cause the delay might have arisen, did not apply to a case of the vendor's own default, but that in that case interest ran only from the time when a good title was shown. "There are two ways," said his lordship,(r) "in which this case may be met in argument and [*382] upon principle. It may either *be considered that that which has happened is not within the contract,—that is, that the party never did mean to contract that he would pay interest, although he might be prevented from having the benefit of his purchase by the default of the vendor, and in this view it is the ordinary case of doing justice between the parties, an event having arisen which is not expressly provided for by the contract : or it may be considered that interest must be paid upon the purchase-money, according to the terms of the contract, although the vendor has not performed his part of the contract, and the purchaser has been thereby exposed to damage (the damage being the difference between the interest and the annual value of the property :) and then, although this is a departure from the terms of the previous contract, which the court would regard as a bar to decreeing a specific performance, yet that the court will in this case regard it, by giving to the purchaser compensation for the loss he has sustained by the non-performance of the whole contract by the vendor." "My opinion," said his lordship, in conclusion,(s) "is that the vendors being in default, the delay having been occasioned by their not performing their part of the contract, are not to exact from the purchaser the payment of interest until the time they showed a good title on their abstract: the effect of that is to postpone the day agreed on for the completion of the contract until the time when the vendors put themselves right, and showed their title to be good on the abstract. The result therefore is, that until that time there would be no demand to be made by the vendors for the payment and therefore the interest which was to stand in the place of that payment had not commenced to run: it did run when they showed a good title, and not before."

§ 902. The cases at law which have decided that the exception in a charter-party as to pirates will not be held *to exempt the owners [*383] from liability, where the ship has fallen into the hands of pirates by the master's negligence,(t) and that a stipulation in a bill of lading exempting the carrier from liability in respect of leakage and breakage will yet not comprise leakage and breakage caused by his negligence or that of his servants,(u) seem to furnish close analogies with the decision of *De Visme v. De Visme*. It is in fact an instance of the general principle, that no man shall take advantage of his own wrong.

§ 903. To bring a case within the principle thus established, it is not necessary that the default on the part of the vendor should be wilful: if it arise from negligence, it will amount to the same thing.(v)

(r) p. 348.

(s) p. 353.

(t) Abbott on Shipping, 9th edit. 317; *De Rothschild v. Royal Mail Steam Packet Company*, 7 Exch. 736. (u) *Phillips v. Clark*, 26 L. J. C. P. 168.

(v) *Robertson v. Skelton*, 12 Beav. 363; *Sherwin v. Shakespeare*, 17 Beav. 267; S. C. 5 De G. M. & G. 517.

§ 904. The rule, however, is one which must be acted upon with some caution. It cannot be laid down that in all cases where a sufficient abstract is not delivered in time, the vendor is to lose the interest which he has stipulated for :*(w)* and it is clear that delay arising from mere accident, or from something which the vendor could not have guarded against, or occasioned by the state of the title, falls within the terms of the condition, and does not deprive the vendor of his right to interest :*(x)* and so in a case where this condition was inserted, and delay arose from circumstances under which the approbation of the court (which was necessary to the sale) was to be obtained, and neither party was to blame, the vendors were held to be entitled to interest by force of this condition, though it *greatly exceeded the amount of the rents and profits of the land.*(y)* [*384]

§ 905. The condition of course applies where the delay arises from an untenable objection taken on the part of the purchaser :*(z)* it operates also where the delay arises from the act of God, as the death of the vendor.*(a)*

§ 906. The court will construe a stipulation fixing the time from which interest is to run in connection with another fixing the time for the delivery of the abstract: so that where there is a stipulation that the abstract shall be delivered by a certain day, and interest begin to run from another and subsequent day, and a perfect abstract is in fact not delivered till after the time fixed for that purpose, interest will not run from the day specified in that behalf, but from a day so long after the actual delivery of a perfect abstract, as the day stipulated for the running of interest was after the day stipulated for the delivery of the abstract.*(b)*

§ 907. The amount on which the purchaser pays interest is the purchase-money less the deposit: and this applies even where the suit may have been made necessary by the purchaser's conduct.*(c)*

§ 908. The vendor is not, it seems, liable to pay interest on the deposit, if the contract proceed.*(d)*

§ 909. The rate of interest usually allowed is £4 per cent.*(e)* But this, of course, may be varied by contract.

§ 910. In one case*(f)* £5 per cent. was given where the circumstances did not justify the delay in paying the money, the Lord Chief Baron observing, "that he had always been *of opinion that a party withholding money from a person entitled to it ought to pay to [**385] the person thus injured the interest which he might have made of it, if

(w) Rowley v. Adams, 12 Beav. 476. See also Cowpe v. Bakewell, 13 Beav. 421; Dyson v. Hornby, 4 De G. & Sm. 481.

(x) Sherwin v. Shakspeare, 17 Beav. 267; S. C. 5 De G. M. & G. 517; Birch v. Podmore, Sug. Vend. 521; Oxenden v. Lord Falmouth, id. 523.

(y) Ex parte the Dean of Durham, 2 Jur. N. S. 345, (Stuart, V. C.)

(z) Storry v. Walsh, 18 Beav. 559.

(a) Bannerman v. Clarke, 3 Drew, 632.

(b) Sherwin v. Shakspeare, 5 De G. M. & G. 517, particularly 536.

(c) Bridges v. Robinson, 3 Mer. 694. *(d)* Sug. Vend. 524.

(e) Calcraft v. Roebuck, 1 Ves. Jun. 221; Seton, Deer. 249.

(f) Burnell v. Brown, 1 J. & W. 168.

it had been paid before."(g) But this does not appear to be the rule of the court.(h)

§ 911. The fact that a purchaser has been making profit by his money whilst it is at his risk, and he is liable to interest, is no ground for increasing the rate of interest payable to the vendor.(i)

§ 912. The vendor in receipt of the rents is generally charged only with the rents he has received, but he may, under certain circumstances, be charged with those which without his wilful fault he might have received.(k) In a case(l) before Sir Thomas Plumer the vendor was so charged, where the circumstances which justified this charge appear to have been the facts that the rents had been allowed to run in arrear, and that it was through the vendor's fault that the purchaser was not able safely to take possession. In a recent case,(m) where the vendor was similarly charged by the master of the rolls, his judgment was reversed, on appeal, by the lord's justices, who decided that, in the absence of special circumstances, the vendor will not be charged with the rents which he might have received without wilful default, and that he will not be subjected to any inquiry unless there be evidence that he has in some way acted otherwise than a prudent owner would have done. The vendor in possession is not therefore, as has sometimes been said, in the position of a bailiff at common law to the purchaser; for such a bailiff is answerable not only for his actual receipts, but for what he might have made of the lands without his wilful default.(n)

*§ 913. If, after the contract, and whilst the land is in the possession of the vendor, any deterioration takes place by his conduct or that of his tenants, he will be accountable for it to the purchaser:(o) and where a purchaser had paid his money into court under an order, and he was considered entitled to compensation for deterioration, he was allowed the amount out of his purchase-money, together with interest at £4 per cent. from the time when he paid it in, and the costs of the trial of the issue directed to ascertain the amount of damage.(p)

§ 914. On the other hand, the purchaser will have to bear the loss from deterioration, First, where it occurs after the time at which he ought to have taken possession.(q)

§ 915. Secondly, where it occurs during the period in which the vendor is in possession, but is the result of accident, without the fault of the vendor: so that where during this period the vendor was, in consequence of such an accident, compelled to expend money on or in respect of the property, as in shoring it up, or removing rubbish which had fallen on a neighbour's property, the vendor was held entitled to have this repaid by the purchaser: but the court refused to make the purchaser pay the expenses of a reference to the master in relation to the repairs,

(g) p. 175.

(h) Sug. Vend. 528.

(i) Acland v. Gaisford, 2 Mad. 28.

(l) Wilson v. Clapham, 1 J. & W. 36.

(m) Sherwin v. Shakespeare, 17 Beav. 267; S. C. 5 De G. M. & G. 517. See also Howell v. Howell, 2 My. & Cr. 478, and compare Sug. Vend. 519.

(n) Co. Litt. 172, a.; Wheeler v. Horne, Willes, 208.

(o) Foster v. Deacon, 3 Mad. 394. (p) Ferguson v. Tadman, 1 Sim. 530.

(q) Binks v. Lord Rokeby, 2 Sw. 222; Minchin v. Nann, 4 Beav. 332.

though that had been proper for the protection of the trustees of the estate.(r)

§ 916. Thirdly, still more clearly where the deterioration during this period is due to the purchaser, though out of possession, must the loss fall on him. Thus, where a purchaser agreed with a tenant of the estate that he should give up possession if the purchaser had a conveyance by a certain time, and the tenant misconstruing the agreement gave up possession though the purchaser had not the conveyance; *the purchaser was held to be the innocent cause of the mischief, and so [*387] responsible for the deterioration which resulted.(s)

§ 917. (2) The cases which arise where the vendor is himself in actual possession correspond with those where he is in receipt of the rents and profits, except that, instead of having to pay over the rents received from others, he will have to pay to the purchaser an occupation rent to be set upon the estate, himself receiving interest in return.(t)

§ 918. No such occupation rent, however, will be allowed where the purchaser ought under the agreement to have taken possession, and the vendor has continued in possession only by reason of the purchaser's wrong doing.(u)

§ 919. (3) The rule that the purchaser in possession shall pay interest on the unpaid part of the purchase-money will be applied even in cases where the delay arises from the neglect of the vendor.(v) "The act of taking possession," said Sir William Grant,(w) "is an implied agreement to pay interest: for so absurd an agreement as that a purchaser is to receive the rents and profits to which he has no legal title, and the vendor is not to have interest, as he has no legal title to the money, can never be implied." And so where a purchase was to be completed by a given day, when the purchaser was to have possession, and it was provided that if from any cause whatever the purchase-money should not be then paid, the purchaser should pay interest, and a delay of six months was occasioned, but innocently, by the vendor in not delivering proper abstracts, he was put to his election to pay interest or give up the rents, though notice had been given by the purchaser that the money was lying idle.(x)

*§ 920. And where a purchaser under a decree accepted possession, and on a report of an objection returned possession, he [*388] was ordered to pay interest from the time at which he took possession, or at which a title was shown under which he might safely have done so, and even for the time during which he returned the possession.(y)

§ 921. So strongly do courts of equity hold to this principle, that a purchaser in possession shall pay interest on the unpaid purchase-money, that it will look at any agreement which appears to prevent the application of this rule by the light of this general principle of justice, and, it

(r) Robertson v. Skelton, 12 Beav. 360.

(s) Harford v. Purrier, 1 Mad. 532.

(t) Dyer v. Hargrave, 10 Ves. 505.

(u) Dakin v. Cope, 2 Russ. 170, 181.

(v) Fludyer v. Cocker, 12 Ves. 25.

(w) S. C. pp. 27, 28.

(x) Cowpe v. Bakewell, 13 Beav. 421.

(y) Binks v. Lord Rokeby, 2 Sw. 222. See also Attorney-General v. Christchurch, 13 Sim. 214.

seems, refuse execution of it where it grossly violates this principle, for "a court of equity interposes only according to conscience."(z) So that where a contract stipulated that the interest on the remainder of the purchase-money should not commence till Lady-day next, in case the title should be perfected and the assurances executed at that time; and if not, then to commence on the execution of such assurances, and the purchaser was let into possession under a stipulation in the contract to that effect, but the assurances were not executed for forty years, the house of lords held that the purchaser's exemption from interest, though permissible if the contract had been speedily executed, would not, under such circumstances and with such length of time, be enforced by a court of equity.(a)

§ 922. In sales of reversionary estates, the purchaser cannot, of course, be let into actual possession or receipt of the profits of the estate purchased. It becomes, therefore, necessary to inquire from what period he is to be treated as if he were in possession, so as to render him liable to the payment of interest on his unpaid purchase-money: for the wearing [*389] away of the lives, or of the time *after which the reversion will vest in possession, is justly considered equivalent to possession, and as creating in the purchaser a liability to pay interest.(b)

§ 923. The purchaser of such an estate pays interest from the time at which he became by law entitled to receive the rents,(c) which is *prima facie* the time fixed for completion of the contract, and not the time at which a good title was shown,(d) except, it seems, where the contract specifies no time for completion, in which case it runs from the time at which a good title was first shown.(e) This may of course be modified by contract: so where the contract stipulated that the rents should belong to the purchaser only from the time the contract was completed, the vendor was held not entitled to claim interest on the unpaid part of the purchase-money.(f)

§ 924. In cases of sales of reversions under the court, interest will, it seems, run from the time the report was confirmed absolute.(g) But where a time is specified at which the money ought to be paid into court, that, and not the confirmation of the sale will, it appears, be the time from which interest will run; as in the case of an estate in possession, that would be the time at which a purchaser would be entitled to enter into the receipt of the rents. So where the 25th December, 1849, was

(z) Per Lord St. Leonards in *Birch v. Joy*, 3 Ho. Lords, 598.

(a) *Birch v. Joy*, 3 Ho. Lords, 565.

(b) See, as well as the subsequent cases, *Davy v. Barber*, 2 Atky. 489.

(c) *Champernowne v. Brooke*, 3 Cl. & Fin. 4, (overruling *Blount v. Blount*, 3 Atky. 636.)

(d) *Bailey v. Collett*, 18 Beav. 179; *Wallis v. Sarel*, 5 De G. & Sm. 429; *Davy v. Barber*, 2 Atky. 489. See *Owen v. Davies*, 3 Atky. 637.

(e) *Enraght v. Fitzgerald*, 2 Dr. & W. 43, reversing Lord Plunkett's decision, S. C. 2 Ir. Eq. R. 87, that interest should run from the date of the report of good title.

(f) *Brooke v. Champernowne*, 4 Cl. & Fin. 589, and see *Weddall v. Nixon*, 17 Beav. 160.

(g) *Ex parte Manning*, 2 P. Wms. 410. See also *Child v. Lord Abingdon*, 1 Ves. Jun. 94; *Trefusis v. Lord Clinton*, 2 Sim. 359.

appointed for the payment of the money into court, but the abstract was delivered in September, 1851, and a good *title was not made [*390] out till March, 1852, interest at £4 per cent. was directed to be paid from the 25th December, 1849.(h)

§ 925. Possession of the estate and of the purchase-money being, as we have seen, mutually exclusive, the vendor is entitled to call on a purchaser in possession to pay the purchase-money into court.

§ 926. Where the purchaser is in possession, and the vendor has disclosed such a title as the purchaser ought to accept, his right thus to proceed is clear. And the court will pursue this course where the purchaser in possession admits a good title, though he may claim the right to object, it not having been approved by counsel.(i)

§ 927. On the other hand it is a general rule that where it is through the *laches* of the vendor that the title remains incomplete, the court will refuse an application for the payment of the purchase-money into court.(k)

§ 928. But where the want of a good title being shown is not from the default of the vendor, the court will, it seems, put the purchaser to his election, either to pay in his purchase-money or to give up possession. Thus, in a case(l) before Lord Eldon, where the purchaser was let into possession, both parties acting in the confidence that the title would soon be made out, and that confidence was "not," to use his lordship's words, "made good, and that was a surprise upon both," his lordship expressed the opinion that the purchaser should be put to his election, either to give up possession or to pay the money into court; but on a subsequent day the lord chancellor said only that the purchaser ought, at least, to pay interest on his purchase-money; and the point was ultimately settled by agreement between the parties. And notwithstanding *some [*391] doubts cast upon the wisdom of this judgment in a subsequent case(m) by Sir Thomas Plumer, who considered it to be "the imprudence of the vendor in letting the vendee into possession before the questions upon the title were disposed of:"(n) the court will generally put a purchaser in possession where the title has not been made out to his election, either to pay in the purchase-money or to give up possession,(o) and the court did so in one case where it was part of the contract that £5000, part of the purchase-money, £6300 should be secured by a mortgage of the estate.(p) In some cases(q) two months, and in another(r) one month, have been allowed the purchaser to elect whether of the alternatives to accept.

§ 929. Where the agreement allows possession to be taken before the

(h) Wallis v. Sarel, 5 De G. & Sm. 429.

(i) Crutchley v. Jerningham, 2 Mer. 502.

(k) Fox v. Birch, 1 Mer. 105.

(l) Gibson v. Clarke, 1 V. & B. 500.

(m) Clarke v. Elliott, 1 Mad. 606.

(n) p. 607.

(o) Clarke v. Wilson, 15 Ves. 317; Smith v. Lloyd, 1 Mad. 83; Wickham v. Evered, 4 Mad. 53; Tindal v. Cobham, 2 My. & K. 385. See also King v. King, 1 My. & K. 442.

(p) Younge v. Duncombe, You. 275.

(q) Younge v. Duncombe, Tindal v. Cobham, ubi sup.

(r) Wickham v. Evered, ubi sup.

completion of the title, the court will not generally order the payment of the purchase-money into court on the score of possession.^(s)

§ 930. And if the purchaser should happen to be in possession under some other title than the agreement, this is a circumstance against calling for the payment of the purchase-money into court; as where the purchaser was in possession not under the agreement for sale, but as tenant to the vendor at the time of the purchase,^(t) or where the purchaser was a tenant in common with the vendor, and had with his consent been in receipt of the rents of the whole.^(u)

§ 931. Where the mere taking possession of the property *does [*392] not furnish any ground for ordering the payment of the money into court, this will yet be done where the purchaser in possession commits acts of ownership, and this, even if the title may not have been made out,^(v) or the purchaser may be in possession according to the terms of his agreement.^(w) For the ground of this proceeding is that by such acts the purchaser is altering the property which constitutes the security of the vendor for his purchase-money, and diminishing the value of the vendor's lien on the estate :^(x) hence, acts of ownership which are clearly an improvement to the estate, will not support such an application to the court :^(y) and hence, also, acts which may not show that the occupier considers himself the owner, and so will not justify a decree of specific performance against him without further investigation of the title, may yet be a ground for an order to pay the money into court, and the appointment of a receiver; so that in one case, stubbing up an osier-bed, levelling the land and filling up a pond, were held to justify an order for payment and the appointment of a receiver, but a reference of title was at the same time made.^(z) In another case,^(a) Lord Eldon took into consideration also the unreasonable delay which had been caused by the purchaser in possession as well as his acts of ownership.

§ 932. In one case where the purchaser had been let into possession under the agreement, and objected to the title, he was allowed to remain in possession on payment of an occupation rent: but the case seems to be one of arrangement, not of strict right.^(b)

§ 933. The order for payment into court may be made *on [*393] motion,^(c) and if circumstances justify it, before answer,^(d) even

(s) Morgan v. Shaw, 2 Mer. 138; Gibson v. Clarke, 1 V. & B. 500; Gell v. Watson, 3 Mad. 225.

(t) Bonner v. Johnston, 1 Mer. 366.

(u) Freebody v. Parry, Coop. 91; cf. Walters v. Upton, Coop. 92, n., which appears to depend on the circumstances stated by Sir Samuel Romilly arguendo, in the case to which it is a note.

(v) Bonner v. Johnston, 1 Mer. 366.

(w) Dixon v. Astley, 19 Ves. 564; S. C. 1 Mer. 133, 378, n.

(x) Cutler v. Simons, 2 Mer. 106, where a list of acts upon which such orders had been made is given.

(y) Bramley v. Teal, 3 Mad. 219.

(z) Osborne v. Harvey, 1 Y. & C. C. C. 116.

(a) Burroughs v. Oakley, 1 Mer. 52, 376, n.

(b) Smith v. Jackson, 1 Mad. 83, 618.

(c) Tindal v. Cobham, 2 My. & K. 385; Wickham v. Evered, 4 Mad. 53. See also Buck v. Lodge, 18 Ves. 450.

(d) Bonner v. Johnston, 1 Mer. 366; Dixon v. Astley, 1 Mer. 133.

though the defendant may have filed no affidavit so as to bring the merits before the court,(e) and though the acts of ownership relied on are not stated in the bill.(f) The facts necessary to support such an application may be supplied by affidavit, whether stated in the bill, and not admitted by the answer,(g) or not stated in the bill.(h)

§ 934. Where an order for payment into court has been opposed, and the money is in the hands of a stakeholder who afterwards absconds, the loss fall on the party who opposed the order.(i)

*C H A P T E R V.

[*394]

OF THE DEPOSIT.

§ 935. It is usual in sales of real estate for the purchaser to pay to the vendor, at the time of the contract, a portion of the purchase-money by way of deposit. Where a suit for specific performance fails, the question has often arisen as to the power of the court to deal with this deposit. The subject must be considered, first, where the vendor is the plaintiff, and secondly, where the purchaser is the plaintiff.

§ 936. (1) Where the vendor is the plaintiff, and fails in his suit for specific performance, the court may dismiss the bill, and order the plaintiff to return the deposit,(a) with interest at £4 per cent.(b) And where a bill sought the renewal of certain leaseholds which the court refused to grant, Lord St. Leonards, acting in analogy with this principle, acceded to the request of the principal defendants, that they might be allowed to put in suit the recognizance which had been entered into by the plaintiffs and a defendant in the same interest for the security of the mesne rates on the leaseholds in question.(c)

§ 937. But the proceeding of the court in this respect is discretionary, and depends on circumstances, for the court, *by dismissing the bill, sometimes means to leave the parties to their legal remedies, in which case it will not order the return of the deposit.(d)

§ 938. (2) With regard to the power of the court to give the purchaser relief in respect of his deposit where he is the plaintiff, and specific performance is not enforced, considerable variation has taken place. In *Denton v. Stewart*,(e) Lord Kenyon decreed the defendants to return the deposit and reimburse the plaintiff his costs, and this was countenanced, though with expressions of doubt on the principle, by Sir

(e) *Blackburn v. Stace*, 6 Mad. 69.

(f) *Cutler v. Simons*, 2 Mer. 103.

(g) *Boothby v. Walker*, 1 Mad. 197.

(h) *Crutchley v. Jerningham*, 2 Mer. 502.

(i) *Fenton v. Browne*, 14 Ves. 144; *Burroughs v. Oakley*, 1 Mer. 52.

(a) *Bryant v. Busk*, 4 Russ. 5; *Hicks v. Phillips*, Prec. in Ch. 575.

(b) *Lord Anson v. Hodges*, 5 Sim. 227; *Webb v. Kirby*, 7 De G. M. & G. 376.

(c) *Butler v. Lord Portarlington*, 1 Dr. & W. 20, 65.

(d) *Southcomb v. Bishop of Exeter*, 6 Ha. 225.

(e) 1 Cox, 258; S. C. 17 Ves. 276, n.

William Grant in *Greenaway v. Adams*.^(f) In both these cases the plaintiff had originally a binding contract, which was only defeated by a subsequent act of the defendant, namely his alienation for a valuable consideration of the property in question. The doubts which Sir William Grant expressed in the case already cited probably increased in his mind, and these, with the general feeling and practice of the profession, induced that judge in a subsequent case to refuse to follow out the principle.^(g) These preceding cases were fully considered by Lord Eldon in *Todd v. Gee*,^(h) where he held that, except in very special cases, a bill cannot be filed asking the performance of a contract, or in the alternative, if it cannot be performed, an issue or an inquiry with a view to damages. The incapacity of the court to give relief in the way of damages was the principle upon which Lord Eldon rested his decision. This decision has been followed in many subsequent cases.⁽ⁱ⁾

§ 939. A recent decision,^(k) however, of Vice-Chancellor Kindersley [*396] *appears to lead to a conclusion practically different from this current of authorities. There the vice-chancellor, grounding himself mainly upon a dictum of Sir Thomas Clarke,^(l) which has received the sanction of Lords Eldon^(m) and St. Leonards,⁽ⁿ⁾ decided that, in cases where the vendor is the beneficial owner, and the sale goes off from want of title or any other circumstance not connected with the actual misconduct of either party, an intended purchaser is entitled to a lien for his deposit on the interest of the vendor in the property sold, and, as a consequence, that a bill may be filed for the enforcement of this lien, or that it may form an alternative prayer in a bill for specific performance. The principle upon which this case proceeds is the enforcement of a lien which is equitable, and not merely of the claim to the repayment of money, which is a legal right.

(f) 12 Ves. 395.

(g) *Gwillim v. Stone*, 14 Ves. 128. See also *Blore v. Sutton*, 3 Mer. 237, 248.

(h) 17 Ves. 273.

(i) *Kendall v. Beckett*, 2 Russ. & M. 88; *Jenkins v. Parkinson*, 2 My. & K. 5; *Van v. Corpe*, 3 My. & K. 269; *Sainsbury v. Jones*, 2 Beav. 462; S. C. 5 My. & Cr. 1; *Williams v. Edwards*, 2 Sim. 78.

(k) *Wythes v. Lee*, 3 Drew, 396, compromised on appeal, 25 L. J. Ch. 389; cf. *Blore v. Sutton*, 3 Mer. 237.

(l) In *Burgess v. Wheate*, 1 Ed. 211.

(m) In *Mackreth v. Symmons*, 15 Ves. 353.

(n) Vend. 552.

PART VI.
OF SOME CONTRACTS IN PARTICULAR.

*CHAPTER I.

[*397]

OF CONTRACTS RELATING TO CONTINGENT INTERESTS AND EXPECTANCIES.

§ 940. At law it has been laid down that the possibility of succession is not an object of disposition, and that if the heir were to dispose of the succession during the life of the ancestor, such disposition would be void, though the inheritance should afterwards have devolved on him :^(a) however, in a recent case before the queen's bench, the court supported as valid an agreement to sell an estate if it should be devised to the vendor by a person then living.^(b) In equity, contracts relating to expectancies have been long upheld,^(c) and that although they may in some sort seem to have defeated the intentions of testators, or been in fraud of parental authority.

§ 941. One of the earliest cases on this subject is *Wiseman v. Roper*,^(d) where a covenant to settle an estate to which the covenantor had only an expectancy as heir, was after the descent of the lands specifically enforced on him.

*§ 942. In *Beckley v. Newland*,^(e) the plaintiff and defendant had married two sisters, who were the presumptive heiresses of Mr. Turgis, a very rich man, who had made and revoked several wills, and ultimately made one leaving a great estate to the defendant, and only a small one to the plaintiff. Previously to the execution of the will, the plaintiff and defendant had entered into an agreement for the equal division between them of what should be left to each of them ; and this agreement was upheld and specifically enforced by Lord Macclesfield, who said that the agreement was “not disappointing the intent of the testator, for he did not design to put it out of either of the devisees’ power to dispose of the estate after it should come to him ; but, on the contrary, when the testator gave it to either of them, he by implication gave that person a power to dispose of the said estate when it should come to him.” The same principle was pursued by his lordship in another like case,^(f) and was followed by Lord Hardwick in upholding the validity of the conveyance of a contingency or possibility on the death of a sister unmarried.^(g)

(a) Per Lord Kenyon in *Jones v. Roe*, 3 T. R. 93. The Roman law likewise prohibited such contracts. Pothier, Tr. des Oblig. part i. ch. 1, sect. 4, § 2.

(b) *Cook v. Field*, 15 Q. B. 460.

(c) Cf. *Alexander v. Duke of Wellington*, 2 R. & My. 35.

(d) 1 Rep. in Ch. 154.

(e) 2 P. Wms. 182.

(f) *Hobson v. Trevor*, 2 P. Wms. 191.

(g) *Wright v. Wright*, 1 Ves. Sen. 409.

§ 943. In *Harwood v. Tooke*,^(h) the plaintiff and the defendant, the celebrated John Horne Tooke, had made a parol agreement to divide what should come to them from a testator: in satisfaction of this the plaintiff had given to the defendant, Tooke, a note for £4000, which he had indorsed over to the other defendant, Sir Francis Burdett, for valuable consideration. All that Lord Eldon ultimately decided in the case may have been that the plaintiff had no equity to follow the note into the hands of this purchaser for value; and it appears from one of the reports that he expressed doubts whether the transaction between the plaintiff and the defendant, Tooke, was not a fraud on the testator, and [*399] *whether the court would at any rate assist in specifically performing such an agreement. But the case has usually been treated as an authority for the validity of contracts relating to expectancies.⁽ⁱ⁾

§ 944. In another case,^(k) the agreement seemed, at first sight, in fraud of the parental authority, but was upheld on a like ground to that taken by Lord Macclesfield. An agreement had been entered into by two sons to divide equally between them whatever they might receive from their father in his lifetime or after his decease, by will or otherwise. It was very strongly argued that this was a scheme on the part of the sons to protect themselves from the consequences of misconduct, and to bid defiance to parental authority. But the vice-chancellor held, that as the testator had the power of giving an estate to his sons, so that they should have only the personal enjoyment without power of alienation, and not choosing so to give it, but giving it absolutely, he had allowed it to become liable to all their antecedent contracts, and therefore to the agreement in question, of which specific performance was accordingly granted.^(l)

§ 945. Similar in principle is the case of *Lyde v. Mynn*,^(m) where a husband granted an annuity for his life, and by way of further security covenanted to charge it on all the property he should, in the event of his wife's decease, become entitled to by her will or otherwise; and it was held that no objection could be taken on the ground of its relating to a mere expectancy; and the court accordingly specifically performed the covenant. And so again, agreements respecting the costs of [*400] proceedings in lunacy, *or the ultimate division of a lunatic's property, are not void.⁽ⁿ⁾

§ 946. The circumstances attending such contracts as those now under discussion are more, rather than less, likely to be such as would prevent the court from enforcing them. Such were the circumstances in *Morse v. Faulkner*,^(o) in the exchequer, and in the more recent case

(h) 2 Sim. 192, from Mr. Maddock's M. S. n.; 1 My. & K. 685.

(i) See per V. C. of England in *Wethered v. Wethered*, 2 Sim. 191; *Hyde v. White*, 5 Sim. 524, and per Lord Chancellor Brougham in *Lyde v. Mynn*, 1 My. & K. 693.

(k) *Wethered v. Wethered*, 2 Sim. 183.

(l) See accordingly *Hyde v. White*, 5 Sim. 524; *Houghton v. Lees*, 1 Jur. N. S. 862, (Stuart, V. C.)

(m) 1 My. & K. 683.

(o) 3 Sw. 429, n.

(n) *Persse v. Persse*, 7 Cl. & Fin. 279.

of Ryan v. Daniel.(p) In the latter case each of two young officers in the army signed and gave to the other a document, by which each charged his estate with £1000 in favour of the other, in case the other should survive him, the consideration of each of these documents being the other of them : many years subsequently a correspondence passed between these officers with a view to a rescission of the transaction, but that intention was never carried into effect. The court held that, looking at the circumstance of the transaction, the age and condition of the parties and their subsequent correspondence, there was no equitable claim which the court would enforce, but it retained the bill for twelve months, with liberty to bring an action to establish, if the plaintiff could, a legal debt.

§ 947. Contracts made by a person before the devolution of the estate or other realization of his expectancy are it seems, purely personal, and only capable of being enforced against the contractor personally during his lifetime. In Morse v. Faulkner, in 1792, the Lord Chief Baron, speaking of such a case, said,(q) "The surrenderor not having any title whatever to the premises, at the time of the surrender, his agreement would not raise a lien upon the land ; and although the present plaintiffs might have been relieved if they had filed their bill against him in his lifetime, that is after his title had accrued, yet it does not follow that therefore they can be relieved against his heirs. Neither the land itself *nor the conscience of the present defendants is bound by this act of William the surrenderor." Similar to this appears to be [*401] the doctrine of Lord Eldon in Careleton v. Leighton,(r) for though his lordship is represented as saying that the expectancy of an heir could not be made the subject of assignment or contract,(s) yet the subsequent sentences seem rather to show his meaning to have been, that though a contract might create a personal liability, there was no such interest as could be assigned or as would pass by a bargain and sale to assignees in bankruptcy.

*CHAPTER II.

[*402]

OF COVENANTS TO RENEW.

§ 948. It is now clearly established that the jurisdiction in specific performance is applicable to covenants to grant perpetual or other renewals, though the practice of the court in past times has somewhat varied in this respect. Lord Hardwicke(a) was of opinion that such covenants were proper subjects for the court's jurisdiction ; but Lord

(p) 1 Y. & C. C. C. 60.

(q) 3 Sw. 433, n.

(r) 3 Mer. 667. In Clayton v. Duke of Newcastle, 2 Cas. in Ch. 112, a contract for the present sale of lands made by the heir-apparent without authority, was enforced against him when in possession.

(s) Qu. for contract read *convoyance*.

(a) Furnival v. Crew, 3 Atky. 83.

Thurlow(*b*) seems strongly to have entertained an opposite opinion, though upon what principle it is not very easy to state; and Lord Northington(*c*) seems previously to have inclined in the same direction. But the jurisdiction of the court was reasserted and upheld by Lord Eldon, (*d*) and is now clearly established(*e*) both in this country and in Ireland, where, from the frequency of renewable lifehold estates, it is of greater importance even than in England.

§ 949. In order for the plaintiff to succeed in obtaining the specific execution of a renewal, he must show in the first place a distinct and clear covenant or agreement to renew on the part of the defendant; and in the second, that he has diligently pursued his right under it.

[*403] § 950. The leaning of the court is said to be against *construing covenants to amount to agreements for perpetual renewals, (*f*) and it is certain that they will not so hold them unless the intention be clear and free from all ambiguity. (*g*)

§ 951. On this principle it has been decided that a covenant in a lease to grant a renewed lease which is to contain all the covenants in the original lease will not imply the insertion in the new lease of a fresh covenant for renewal, which would make the original covenant operate as a perpetual renewal : (*h*) the covenant for renewal has, it has been observed, nothing to do with the subject-matter to be granted, namely, the new term.

§ 952. But, of course, where any special words are added, they may vary the case: thus where the covenant was to grant such further lease as the lessee should desire, (*i*) or where the covenant was to grant a new lease or leases, and so to continue the renewing such lease or leases: (*k*) and where the lease was for the lives of A., B., and C., and the covenant was, on the death of any of them, the said A., B., or C., to grant a new lease for the lives of the survivors, and a new life to be named, such lease to contain all the covenants, including "this present covenant," as were contained in the original lease : (*l*) in all these cases the covenant was held to amount to one for perpetual renewal.

§ 953. It does not come within the scope of the present work to enter at any length into the construction of these covenants, and to show what particular forms of expression have, and what other have not, [*404] been held to amount to a *covenant for perpetual renewal. It

(*b*) Somerville v. Chapman, 1 Bro. C. C. 61; Tritton v. Foote, 2 Bro. C. C. 636; Rees v. Daere, cited 9 Ves. 332.

(*c*) Redshaw v. Governor of Bedford Level, 1 Ed. 346.

(*d*) Iggunlen v. May, 9 Ves. 325; Willan v. Willan, 16 Ves. 84.

(*e*) Brown v. Tighe, 2 Ch. & Fin. 396; S. C. 8 Bl. N. S. 272. See 1 Ed. 348, n.

(*f*) 1 Ed. 349, n.

(*g*) Brown v. Tighe, ubi sup.; per Lord Alvanley, in Baynham v. Guy's Hospital, 3 Ves. 298.

(*h*) Hyde v. Skinner, 2 P. Wms, 196; Tritton v. Foote, 2 Bro. C. C. 636; Russell v. Darwin, 2 Bro. C. C. 639, n.; Moore v. Foley, 6 Ves. 232; Harnett v. Yielding, 2 Sch. & Lef. 549; Iggunlen v. May, 7 East, 239; see contra, Bridges v. Hitchcock, cited 3 Atky. 88; but see S. C. cited 7 East, 245.

(*i*) Bridges v. Hitchcock, 7 East, 245.

(*k*) Furnival v. Crew, 3 Atky. 83.

(*l*) Hare v. Burges, 4 K. & J. 45.

will be sufficient to cite below a few of the more important cases which have been decided on this question.(m)

§ 954. A clear agreement being, as we have seen, essential, it follows that a usage of granting renewals, constituting what is sometimes vaguely called a tenant-right, though with the additional circumstance of expenditure on the land, will not amount to a contract for renewal, and cannot be enforced as such.(n)

§ 955. It may be desirable also to add, that the proper form for a lease by trustees, in pursuance of their testator's covenant for perpetual renewal, is for the lease to recite the covenant, and to declare the new lease to be granted in pursuance of it, the trustees themselves not being liable to enter into a covenant for renewal similar to that in the old lease.(o) This mode of execution is directed by the court even where the covenant stipulates that in every future lease there should be inserted the like covenant for renewal.(p)

§ 956. In order to entitle the lessee to claim the benefit of his renewal by specific performance, his conduct in pursuance of his right must have been diligent.

§ 957. Therefore, where the lease was for renewal on the dropping of one life, and the application for a renewal was not made until two had expired, the negligence of the lessee was held to debar him from specific performance.(q)

§ 958. And where there are conditions precedent to the renewal according to the terms of the covenant, the lessor must show the performance of these as he would have to do in relation to any other covenant.(r)

*§ 959. The court, however, does not insist upon a literal and exact performance of his part by the lessee, but has granted performance where there has been some *laches* on his part, if excused by fraud or surprise, or by unavoidable accident or ignorance that is not wilful, provided that in those cases where the delay has not arisen from the conduct of the lessor, his interest is not prejudiced by the delay :(s) and Lord Redesdale,(t) reviewing the cases in Ireland prior to the legislation upon this subject came to the conclusion that, as Lord Thurlow had stated, "Equity will relieve where there is mere lapse of time unaccounted for without misconduct in the lessee, or where the lessee has lost his right by fraud in the lessor." But this relief is excluded by wilful neglect or refusal to renew: and it has been decided that non-payment of the proportion of the fine after demand made by the lessor, who himself holds of a superior, is such neglect and refusal, and therefore disentitles the lessee to relief.(u)

(m) *Brown v. Tighe*, ubi sup.; *Smyth v. Nangle*, 2 Cl. & Fin. 405; *Copper Mining Company v. Beach*, 13 Beav. 478; *Chambers v. Gaussen*, 2 Jon. & L. 99.

(n) *Watson v. Hemsworth Hospital*, 14 Ves. 324.

(o) *Copper Mining Company v. Beach*; *Hare v. Burges*, ubi sup.

(p) *Hodges v. Blagrove*, 18 Beav. 404.

(q) *Bayley v. Corporation of Leominster*, 3 Bro. C. C. 529; *Baynham v. Guy's Hospital*, 3 Ves. 295. (r) *Job v. Banister*, 26 L. J. Ch. 125, (L. C.)

(s) *Eaton v. Lyon*, 3 Ves. 690, particularly 693, 695.

(t) In *Lennon v. Napper*, 2 Sch. & Lef. 682. See per Lord Thurlow, in *Batemann v. Murray*, cited 4 Bro. C. C. 417.

(u) *Chesterman v. Mann*, 9 Ha. 206. See also *City of London v. Mitford*, 14

§ 960. The law on this subject has in Ireland been regulated by act of parliament. By the statute 19 & 20 Geo. III. c. 30, mere neglect, where no fraud appears to have been intended, is prevented from defeating the interest of the lessee and the right of renewal, unless where, after a demand of the fines by the landlords, lessors, or persons entitled to receive such fines, the same have been refused or neglected to be paid within a reasonable time after such demand. The law in England being unaffected by legislative enactment, remains as it was in Ireland previous to the above-mentioned statute, and is entirely unaffected by the peculiar [*406] and “local equity” administered on this head *by the court of chancery in Ireland.(v) As to the Irish tenantry acts and this equity, it will, for the purposes of this work, be sufficient to refer the reader to the case of *Jackson v. Saunders*(w) in the house of lords, and the cases of *Butler v. Lord Portarlington*(x) and *Alder v. Ward*(y) before Lord St Leonards, when chancellor of Ireland.

[*407]

*CHAPTER III.

OF CONTRACTS OF PARTNERSHIP.

§ 961. In order that the court shall in any way interfere for the specific enforcement of contracts to enter into partnership, it is necessary, as we have already seen,(a) that the partnership should be for some definite term, for otherwise it might be dissolved as soon as entered upon, and the interference of the court thus become simply nugatory. But where the agreement is thus for a definite term, the court will specifically execute it by decreeing the parties to execute a proper partnership deed, and, if necessary, by restraining any partner from carrying on business under the partnership style with other persons, and from publishing notices of dissolution.(b)

§ 962. Contracts for partnership may in some cases be illegal, as amounting to sales of office, as contravening the laws regulating trade, or otherwise.(c) It is hardly necessary to observe that the court will not in any way interfere for the benefit of parties claiming under such agreements.

§ 963. Again, where the agreement had reference to the manufacture

Ves. 41. As to whether breach of covenants in the lease is a bar to a renewal, see *Trant v. Dwyer*, 2 Bli. N. S. 11, ante, § 648.

(v) *Job v. Banister*, 26 L. J. Ch. 125, (L. C.)

(w) 2 Dow, 437.

(x) 1 Dr. & War. 20.

(y) 2 Jon. & L. 571.

(a) Ante, § 45.

(b) *England v. Curling*, 8 Beav. 129, where the forms of decree and injunction are given.

(c) See *Hughes v. Statham*, 4 B. & C. 187; *Knowles v. Haughton*, 11 Ves. 168.

and sale of a patent medicine, Lord Eldon considered that the court could not decree specific performance, because if the recipe were a secret the court had no means of enforcing its own orders.(d)

*CHAPTER IV.

[*408]

OF CONTRACTS FOR THE SALE OF SHIPS.

§ 964. An agreement for the sale of a ship, or of shares in one, which does not recite the certificate of registry, cannot be enforced in equity.(a) The statute by which this subject is now regulated enacts, "that when and so often as the property in any ship or vessel, or any part thereof, belonging to any of her majesty's subjects, shall, after registry thereof, be sold to any other or others of her majesty's subjects, the same shall be transferred by bill of sale or other instrument in writing, containing a recital of the certificate of registry of such ship or vessel, or the principal contents thereof, otherwise such transfer shall not be valid or effectual for any purpose whatever, either in law or in equity,"(b) to which is added a proviso limiting the effect of an error in such recital. This clause, which is a re-enactment of 6 Geo. IV. c. 110, s. 31, departs somewhat from the language of the older statutes; but it has been decided that this change of language gives no room to the distinction which has been attempted between actual transfers and executory agreements to transfer, and that both are alike avoided by the acts, unless complying with its requirements.(c)

§ 965. How far actual fraud under these acts would be *relievable in equity appears never to have been decided, "but of this," [*409] said Lord St. Leonards,(dd) "I am perfectly clear that, so far as the authorities have gone, there have been cases very much like fraud, and yet no relief has been given."

(d) Newbery v. James, 2 Mer. 446. See also, as to secret medicines, Williams v. Williams, 3 Mer. 157; Green v. Folgham, 1 S. & S. 398; Yovatt v. Winyard, 1 J. & W. 394. See also Lingen v. Simpson, 1 S. & S. 600.

(a) Brewster v. Clarke, 2 Mer. 75.

(b) 8 & 9 Vict. c. 89, s. 34. See also 17 & 18 Vict. c. 104, s. 43, and 18 & 19 Vict. c. 91, s. 11.

(c) Hughes v. Morris, 2 De G. M. & G. 349; S. C. 9 H. 636; M'Calmont v. Rankin, 2 De G. M. & G. 403, 418; Coombs v. Mansfield, 24 L. J. Ch. 513, (Kindersley, V. C.)

(dd) In M'Calmont v. Rankin, 2 De G. M. & G. 421, where his lordship discussed the previous cases.

[*410]

*CHAPTER V.

OF AGREEMENTS FOR SEPARATION DEEDS.

§ 966. THE jurisdiction of courts of equity to enforce the specific performance of agreements for separation, by the execution of proper deeds of separation, was established in the house of lords, after a learned argument against it, in the case of *Wilson v. Wilson*,^(a) where Lord Cottenham showed that the law does not now consider an agreement for separation so contrary to public policy as to make void all arrangements of property arising out of it. The court will also carry out, by injunction, the covenant by the husband to forbear from personal molestation of his wife.^(b) But it seems very doubtful whether it would specifically perform the covenant to live separately, and restrain by injunction a suit for restitution of conjugal rights.^(c)

§ 967. In order to enable the court thus to interfere, there must of course be a valid agreement. It is essential to this that the contract be between persons capable of contracting, and therefore, as a husband cannot contract with his wife without the intervention of some third person, a simple agreement between them to live separate will not be enforced by the court.^(d)

[*§ 968.] For the same end, also, there must be a good consideration, and as in deeds and agreements for separation this is sometimes peculiar, it will be well very briefly to allude to a few of the cases.

§ 969. It has been decided that the staying a suit in the ecclesiastical court for nullity of marriage, on the ground of impotency of the husband, is a sufficient consideration as against him :^(e) and where the husband had so behaved as that the wife might have obtained a divorce *a mensâ et thoro*, and she agreed, instead of prosecuting her right, to accept maintenance from the husband, this was held a good consideration.^(f) A good consideration is also afforded by an engagement by the trustees to indemnify the husband against the wife's debts,^(g) or even by a covenant to that effect conditional on an annuity, which was agreed to be paid, being secured,^(h) or, as it seems, by a covenant of a third party to pay the husband's debts.⁽ⁱ⁾

§ 970. In many of the cases which have arisen on the consideration

(a) 1 Ho. Lords, 538, affirming S. C. 14 Sim. 405; *Fletcher v. Fletcher*, 2 Cox, 99.

(b) *Sanders v. Rodway*, 22 L. J. Ch. 230, (M. R.)

(c) *Wilson v. Wilson*, 5 Ho. Lords, 40.

(d) *Hope v. Hope*, 26 L. J. Ch. 417, (L. JJ.); *Wilkes v. Wilkes*, 2 Dick. 791; cf. *Vansittart v. Vansittart*, 4 K. & J. 62.

(e) *Wilson v. Wilson*, 1 Ho. Lords, 538; S. C. 14 Sim. 405.

(f) *Hobbs v. Hull*, 1 Cox, 445.

(g) *Stephens v. Olive*, 2 Bro. C. C. 90; *Lord Westmeath v. Countess of Westmeath*, Jac. 126, 141; *Elsworthy v. Bird*, 2 S. & S. 372.

(h) *Wellesley v. Wellesley*, 10 Sim. 256.

(i) *Wilson v. Wilson*, 1 Ho. Lords, 538.

of these instruments, the contention has been on the part of the creditors of the husband that the arrangement is fraudulent as against them. But of course a consideration which has been held good as against the creditors, must be good as against the husband.

*CHAPTER VI.

[*412]

OF AGREEMENTS TO COMPROMISE.

§ 971. THE court will specifically enforce private compromises of rights in the way in which it will any other agreements : and, inasmuch as the compromise of a claim *bona fide* to which a person believes himself to be liable, and of the nature of which he is aware, is a good consideration for an agreement, the court, in enforcing the compromise, will not inquire into the validity of the claim on which it is founded.(a)

§ 972. The question arises, with regard to compromises of suits, how far they can be enforced by motion or petition in the original suit to stay proceedings, and how far by a fresh suit for the specific performance of them. It seems that where the immediate interference of the court is necessary to carry the agreement into effect,—as, for instance, where a party to the agreement was liable to an immediate attachment,—the court will to that extent interfere to execute the agreement by a proceeding in the original suit: but that if not in all other cases, at least in all cases where the agreement of compromise goes beyond the ordinary range of the court in the existing suit, or the equity sought to be enforced is different from that on the record, or the agreement is disputed, or the right to have it enforced in the suit is disputed, there the proper course of proceeding *is by bill for the specific performance of the agreement of compromise.(b) [*413]

§ 973. In the recent case of *Swinfen v. Swinfen*,(c) a bill for the specific performance of a compromise was dismissed, but without costs, on the ground that the compromise arose from the mistake of counsel.

(a) *Attwood v. ——*, 1 Russ. 353.

(b) *Forsyth v. Manton*, 5 Mad. 78; *Wood v. Rowe*, 2 Bl. 595, 617; *Askew v. Millington*, 9 Ha. 65; *Richardson v. Eyton*, 2 De G. M. & G. 79, which seem to overrule the dictum of Lord Eldon in *Rowe v. Wood*, 1 J. & W. 337, and the case of *Tibbutt v. Potter*, 4 Ha. 164.

(c) 27 L. J. Ch. 35, (M. R.)

[*414]

*CHAPTER VII.

OF AWARDS.

§ 974. THE court has in many cases, and in some of them early ones, decreed the specific performance of awards, though not made rules or orders of the court, for the performance of some specific thing, as to convey an estate, assign securities, or the like ;(a) but not it would seem, awards simply to pay money.(b) The court thus decrees their performance, "because," to use Lord Eldon's language,(c) "the award supposes an agreement between the parties, and contains no more than the terms of that agreement ascertained by a third person."

§ 975. There is an old case in which the court specifically enforced an award not binding by form of law.(d) But in *Blundell v. Brettargh*,(e) Lord Eldon said he had met with no authority for the specific performance of an award by arbitrators appointed for the valuation of interests, where their acts, for the purpose of carrying into effect the agreement for an award, were not valid at law, as to the time, manner, or other circumstances, unless in the cases of acquiescence or part performance : and accordingly in the case before him he refused specific performance of an agreement to sell at a valuation, which, on the construction of [*415] *the agreement, the court held was to be made during the lives of the parties, one of them having died before the award was made.

§ 976. The interference of the court in these cases being in exercise not of any jurisdiction peculiar to awards, but of its ordinary jurisdiction as applied to the specific performance of agreements, it follows that many, if not all, the principles applicable to ordinary suits of that nature must apply.(f)

§ 977. Where therefore the agreement contained in the submission is such in its character as, whether from its unreasonableness, unfairness, or imprudence, the court would not specifically enforce, this will prevent its interference in respect of the award founded on it.(g)

§ 978. Nor can the court interfere where the award is excessive or defective ; not if it be excessive, for so far the arbitrator has gone beyond his authority, and there is no binding agreement between the parties : not if it be defective, because the parties had agreed to be bound by his decision on the whole, and not on part of the matters submitted to him.(h)

§ 979. The objection arising from unreasonableness, not of the submission but of the award itself, the court is less willing to entertain ; for the arbitrators being judges of the parties' own choosing, it has been

(a) *Norton v. Mascall*, 2 Vern. 24; *Hall v. Hardy*, 3 P. Wms. 187.

(b) Note of reporter, 3 P. Wms. 190.

(c) In *Wood v. Griffith*, 1 Sw. 54; per Turner, L. J., in *Nickels v. Hancock*, 7 De G. M. & G. 300.

(d) *Norton v. Mascall*, ubi supra.

(e) 17 Ves. 232, 241.

(f) *Nickels v. Hancock*, 7 De G. M. & G. 300.

(g) S. C. See ante, § 254.

(h) *Nickels v. Hancock*, 7 De G. M. & G. 300.

held that the award cannot be objected to by either of the parties, on the ground of its being unreasonable.⁽ⁱ⁾ This principle was stated and acted on by Lord Eldon in *Wood v. Griffith*,^(k) where his lordship enforced the specific performance of an award which ordered the sale of an estate under circumstances which greatly depreciated its value. Nevertheless, it cannot, *it seems, be laid down as an universal rule [*416] that the court will not consider the unreasonableness of an award; for, in a previous case before the same judge,^(l) he refused the specific performance of an agreement to sell an estate at such price as a valuer should award, the award having been made, partly in consideration of circumstances which threw a doubt on the valuations having been made with due attention to accuracy. And in a case^(m) before Sir Thomas Plumer, M.R., it was held that the fact that the sale was agreed to be at a valuation, to be fixed by arbitrators, will not prevent the court from inquiring into the adequacy of the consideration. And, again, in a recent case,⁽ⁿ⁾ in which the award was objected to as unreasonable, but it was contended on the other side that the court could not entertain the objection, Lord Justice Turner,^(o) after expressing his dissent from the observations of Lord Eldon in *Wood v. Griffiths*, said, “If it be a fair subject for discussion and consideration, whether one course or another course be the right one to be taken by parties who have submitted their differences to arbitration, and have said that they will abide by the decision of the arbitrator, I might agree that the judgment of the arbitrator upon that question must decide the point. But here the judgment of the arbitrator goes to the length of destroying the rights of one of the parties to the agreement, though the parties never authorized Mr. Carpmael to decide that any one of them had no right, and should acquire no interest in the subject in dispute, but only agreed that he should determine the mode in which their rights and interests should be regulated. It seems to me, therefore, that if it was necessary to decide this question upon the point of unreasonableness, that point alone would be sufficient to decide it.”

*CHAPTER VIII.

[*417]

OF AGREEMENTS TO REFER TO ARBITRATION.

§ 980. WITH regard to agreements to refer to arbitration, it is clear that the court will not entertain suits for their specific performance,—a principle, in the first place, it seems, acted upon by Lord Thurlow in a case of *Price v. Williams*,^(a) and which has been since well established.^(b)

(i) Per Lord Hardwicke in *Ives v. Metcalf*, 1 Atk. 64.

(k) 1 Sw. 43. See ante, § 254. (l) *Emery v. Wase*, 8 Ves. 505.

(m) *Parken v. Whitby*, T. & R. 366.

(n) *Nickels v. Hancock*, 7 De G. M. & G. 300.

(a) Referred to 6 Ves. 818.

(o) p. 325.

(b) *Street v. Rigby*, 6 Ves. 815; per Sir W. Grant in *Gourlay v. Duke of So-*

In a recent case, the lords justices upon this, amongst other grounds, refused to compel the specific execution of a bond to refer to arbitration.(c) There is a case(d) before Sir John Leach, somewhat briefly reported as to its circumstances, which appears in some degree at variance with the cases already stated ; for there the vendor refusing to permit the referees to come upon the land, the court compelled him to permit the valuation.

§ 981. Though the court will thus refuse specifically to enforce references to arbitration, an inequitable refusal of a plaintiff to make such a reference may disentitle him to the aid of the court, on the principle that he who seeks equity must do equity. Thus, where a deed was executed which created a lien for the amount of a solicitor's bills and advances, the amount of which was to be settled by arbitration, and [*_418] the arbitrator died before the award was *made : in a suit seeking the reconveyance of the property, Alderson, B., held that the agreement between the parties was composed of two distinct parts,—the first admitting that some balance was due to the solicitor, and the second, an agreement for a specific mode of ascertaining that balance ; that the latter part alone had failed ; that the former part remained entire, and that the court would not decree a reconveyance without the plaintiff's consenting to do equity by having the accounts taken by the master.(e)

merset, 19 Ves. 429; Agar v. Macklew, 2 S. & S. 418; Gervaise v. Edwards, 2 Dr. & W. 80.

(c) South Wales Railway Company v. Wythes, 5 De G. M. & G. 800.

(d) Morse v. Merest, 6 Mad. 26. (e) Cheslyn v. Dalby, 2 Y. & C. Ex. 170.

INDEX.

The pages referred to are those between brackets [].

ACCEPTANCE. (See *Proposal and Acceptance*.)

ACCIDENT. (See *Consideration, Failure of*.)

ACQUIESCE, contract modified by, 220.

 in transaction based on fraud, 308.

 breach of covenant, a bar to specific performance of, 321.

ACT OF GOD rendering one alternative impossible, 297.

 delay arising from, 384.

ACT OF OWNERSHIP. (See *Payment into Court, Waiver*.)

ADMISSION. (See *Pleading, Statute of Frauds, Part Performance*.)

AGENT. (See *Auctioneer, Pleading*.)

 suing as principal, 51.

 when he cannot appear as principal, 52.

 promoters of a company not agents of company, 64.

 appearing on contract as agent, 67.

 principal, 67.

 suing, 69.

 being sued, 69.

may be appointed by parol, 68.

incapacity to contract with principals, 74.

what contracts by, not enforced, 115.

signature of, agreement by, 163.

 what authority required for such signature, 163.

 may be by parol, 163.

 exception as to agents of corporations, 164.

 by ratification, 164.

revocation of agency, 164.

auctioneer, 164.

clerks of agents, 165.

solicitor, 165.

misrepresentation by, 193.

suppression of a fact by, 207.

fraud by, 210.

AGREEMENT. (See *Contract*.)

AGREEMENT TO MAKE WILLS, enforced, 60, 298.

AMALGAMATION of companies, effect of, on contracts, 60, 296.

ANNUITY, bill by vendor of, 12.

 sale of, defeated by death of life before the contract, 263.

secus by death after, 267.

ANSWER. (See *Pleading*.)

ARBITRATORS, price to be ascertained by, 95, 96.

agreements to refer to, not enforced, 417.

ASSIGNEES. (See *Bankruptcy*.)

ASSIGNMENT of contract, 51.

by way of mortgage, 52.

exceptions to assignability of contracts, 52.

where contract personal, 52, 68.

where a proviso against assignment, 55.

where illegal, 55.

of contract affected by fraud, 203.

offer not assignable, 57.

of the property, 57.

ATTORNEY, agreements for sale of business of, 17.

contracts, in absence of, 110.

acting for both parties, 112.

how far agent to sign an agreement, 165.

AUCTIONEER, an agent for both parties at the auction, 164.

secus in private contract, 164.

clerk of, an agent, 165.

selling without authority, 215.

AUTHOR and publisher, contract of, is personal, 49, 53.

AWARDS, unreasonableness in submission, a defence, 117, 415.

award often no defence, 117, 415.

illegality in, a defence, 144.

void as to one alternative, binds as to the other, 297.

jurisdiction in enforcing, 414.

where not binding at law, 414.

grounds of defence, 415.

where award excessive, 415.

BANKRUPTCY Court no jurisdiction in specific performance, 1, *n.*

assignees in, when parties, 37.

what contracts do not pass under, 53, 55.

what contracts by assignees not enforced, 115.

assignees enforcing contracts must covenant personally, 279.

secus, when enforced against them, 280.

of plaintiff a bar to suit, 280.

BARON AND FEME, (See *Feme Covert, Marriage, Separation Deed*.)

contracts between, enforced, 3.

contract by, to sell, 134, *n.*

not enforced, where wife refuses, 293.

BILL. (See *Pleading*.)

BOND. (See *Penalty*.)

condition of, an agreement, 28.

BREACH OF TRUST, no contract necessitating, enforced, 113.

by quasi trustees, 115.

by railway directors, 115.

BUILDING CONTRACTS, formerly enforced, 15.

when not enforced, 19.

when enforced, 20.

CESTUIS QUE TRUST. (See *Parties*.)

CESTUI QUE VIE. (See *Death*.)

CHAMPARTY, assignments void for, 56.

CHARTER-PARTY, specifically performed, 13.

CHATTELS, contract for, not generally enforced, 13.

enforced where part only of contract, 13.

where chattels unique, 13.

where defendant alone can supply plaintiff's requirements, 14.

where savoring of realty, 14.

where trust constituted, 15.

CHATTELS, *continued.*

enforced where delivered by instalments, 16.
warranty in contracts for sale of, 262, 263.

CHOOSE IN ACTION, agreements to assign, 3.

CIVIL LAW did not specifically perform contracts, 1.
rule of, as to inadequacy of consideration, 131.

CLAIM, suit instituted by, 327.

when leave required, 327.

COLLIERY. (See Mines.)**COMPANY. (See Amalgamation, Corporation, Railway.)**

purchase under compulsory powers of, 9.

 when not enforced in equity, 9.
 enforced, 10.

agreement to take shares in, 19.

contracts by, devolving statutory powers, illegal, 57.

amalgamation, 60.

when liable for contracts of promoters, 61.

contracts by directors in breach of their trust, 115.

 enforced after expiration of powers, 117, 135

hardship on members of, disregarded, 121.

 companies regarded, 124.

agreement for division of profits, 148.

 use of line of railway, 149.

agreement to pay parliamentary costs of another, 150.

purchases for extraordinary purposes, 153.

bound to apply its funds for purposes of its act, 150, 153.

contract by, formalities in, 155.

COMPENSATION, origin of jurisdiction, 2, 344.

as to fines, 141.

and rescission, conditions for, mutually exclusive, 310.

where vendor plaintiff, 344.

 purchaser plaintiff, 137, 345.

how differing from damages, 345.

where defect not material, 348.

how calculated, 349.

for difference in tenure, 350.

 incumbrances, 350.

 tithes, 351.

indemnity by way of, 351.

for matters subsequent to contract, 355.

 deterioration, 355.

conditions of sale for, 355.

none, where not ascertainable, 140, 352.

 it would prejudice third parties, 141.

 large part wanting, 141.

 material part wanting, 346.

 material difference, 349.

 purchaser aware of vendor's want of title, 142.

 misrepresentation, 343, 352.

 it would be an indemnity, 351.

 defect is patent, 353.

 excluded by contract, 354.

 after complete execution of contract, 355.

COMPROMISES not avoided, by what errors, 107, 412.

 agreements for, how enforced, 412.

CONCEALMENT. (See Fraud.)**CONDITIONS. (See Bond, Contract Conditional.)**

no change of property till performance of, 265.

non-performance a defence, 287, 404.

express or implied, 287.

in railway contracts, 287.

CONDITIONS, *continued.*

for avoidance of contract, 307.

CONDITIONS OF SALE,

for rescission, (and see *Rescission*,) 307.

how regarded, 340.

where ambiguous, 341.

sense not extended by implication, 342.

will not apply where fraud or misrepresentation, 343.

facts stated in, 343.

for compensation, (and see *Compensation*,) 355.

reserving rents to vendor, 379.

for interest on delay "from any cause whatever," 380.

for interest construed as dependent on one for delivery of abstract, 384.

restricting payment of interest by purchaser in possession, 388.

CONSENT to contract, in what it consists, 110, *n.*

of third persons required, 292.

CONSIDERATION, additional, proved by parol, 233.

executory when a bar to performance, 240.

in agreements for separation, 411.

CONSIDERATION, FAILURE OF, a defence, 262.

events happening before conclusion of contract, 262.

after conclusion, 266.

determination of subject-matter after filing of bill, 267.

CONSIDERATION, INADEQUACY OF, how it appears in the contract, 127.

difference between cases of vendor and purchaser, 127.

with other circumstances a defence in specific performance, 127.

and ground for rescission, 128.

alone, as ground for rescission, 128.

a defence in specific performance, 128.

when decided, 131.

CONTRACT. (See *Contract, Terms of: Honorary Engagements, Proposal and Acceptance.*)

alternative, 247, 296.

building. (See *Building Contract*.)

conditional, 135, 265, 287.

divisible or not, 237.

with several purchasers, 39.

property in one lot, 237.

of different kinds, 238.

distinct lots, 238.

different prices, 239.

cross contracts, 239.

foreign, 24.

negative, 329.

revocable, 18.

unilateral, 135, 317, 321.

voluntary, 25.

under compulsory powers constituted by notice, 9.

when not enforced in equity, 9.

enforced, 10.

may give jurisdiction, 24.

as to land abroad, 24.

with a penalty, 26.

signed by one party only not revocable, 76.

constituted by representation, (see *Representation*,) 84.

in deed poll, 137.

when concluded, in sales by court, 263.

in private contracts, 264.

in conditional contracts, 265.

effect of, in transferring property, 377.

CONTRACT, CERTAINTY OF, want of, in sales of goodwill, 17.

- CONTRACT, CERTAINTY OF, *continued.*
 different at law and in equity, 102.
 what, required, 102.
 contract discrepant with itself, 103.
 subsequent ascertainment of things uncertain at time of contract, 107, 108,
 109.
- CONTRACT, COMPLETENESS OF, essential to performance, 90, 159.
 when ascertained, 91.
 where incomplete from defendant's default, 91.
 incompleteness is made good from contract itself, 91.
 as to subject-matter, 92.
 parties, 94.
 as to price, 94.
 when not ascertained, 94.
 when mode of ascertainment indicated, 94.
 as to terms of contract, 98.
- CONTRACT, EQUALITY OF, essential to performance, 90.
 in what it consists, 106, *n.*
- CONTRACT, FAIRNESS IN, essential to performance, 90, 106.
 in what it consists, 106.
 time of deciding, 107.
 in compromises, 107.
 want of knowledge in one party, 108, 112.
 surrounding circumstances regarded, 110.
 unfairness not intentional, 111.
 suppression of a fact, 111.
 intoxication of party, 112.
 where contract would injure third persons, 112, 141.
 in sales of reversions, 124.
- CONTRACT, HARDSHIP OF, a bar to performance, 116.
 when decided, 116, 117.
 arising from plaintiff's subsequent acts, 118.
 patent or latent, 119.
 arising from defendant's own acts, 120.
 in contracts by companies, 121.
 liability to forfeiture, 121.
 other liabilities, 122, 123.
- CONTRACT, ILLEGALITY OF, devolving statutory powers, 55.
 a bar to performance, 143.
 nature of the defence, 143.
 where the defendant has received the benefit of plaintiff's performance, 144.
 in awards, 144.
 noticed by the court though not put in issue, 145.
 clearness of, required, 145.
 where a trust is constituted, 145.
 where contract is rendered illegal by subsequent legislation, 269, 294.
 contract modelled to avoid, 294.
- CONTRACT, TERMS OF, essential and non-essential, 2, 97, 272, 293, 312.
 what, essential to completeness, 98.
 how far must go into detail, 98.
 implied, 99.
 in sale of land, 99.
 in agreement to renew, 99.
 for underlease, 100.
 as to usual stipulations, 100.
 rebutted by express term, 101.
 or by notice, 100, 101.
- classification of, by jurists, 99, *n.*
express, not affected by notice, 101.
negative, 244, 245.

- CONTRACT ULTRA VIRES of the company, entered into by promoters not enforced, 64.
 by trustees not enforced, 114.
 by corporations, (see *Corporations*.) 147.
- CONTRAVENTION OF THE CONTRACT, ACTS IN, a bar to suit, 282.
 in case of leases, 283.
 purchases, 284.
 as to covenants to renew, 285, 405.
 no bar where breaches small, 285.
 not wilful, 285.
 nominal, 285.
 in cases of breach being waived, 285.
- CONVEYANCE, distinction between question of, and of title, 374.
- CORPORATIONS, powers of contracting, 147.
 their contracts presumed good, 147.
 where presumption is rebutted, 147.
 where defeating objects of incorporation, 149.
 where objects are foreign to incorporation, 150.
 not where for something involved in object of the incorporation, 151.
 nor where variation only of means, *semble*, 152.
 where contract binds the corporation though *ultra vires*, 153.
 agent of cannot be appointed by parol, 164.
 part performance supplies want of seal in contract, 177.
 fraud by, 210.
- COVENANTS, farming not enforced, 16.
 where breaches are frequent, 17.
 to be entered into by executors of proposed lessee, 49.
 enforced against purchasers with notice, 59.
 entering into a covenant to do a thing is no performance of an agreement
 to do the thing, 240, 241.
 by assignees in bankruptcy, 279.
 by trustees, 280, *n.*
 breach of, a bar to suit for lease, 283.
 suit on, barred by acquiescence, 321.
- COVENANT FOR FURTHER ASSURANCE, how enforced, 59.
- COVENANT FOR RENEWAL, enforced by assignee, 51.
 against purchaser with notice, 59.
 implication as to length of new term, 99.
 when enforced without contribution to fine, 117.
 breach of covenants in lease, no bar to suit for, 285, 405.
 jurisdiction of equity in enforcing, 402.
 what amounts to such a covenant, 402.
 usage to renew not enforced, 404.
 renewals by trustees, 404.
 lessee must be diligent, 404.
 in Ireland, 405.
- CREDITORS. (See *Judgment Creditors*.)
 enforcing a contract entered into by debtor, 48.
- CY PRES EXECUTION OF CONTRACTS,
 where vendor has not the exact estate be contracted to sell, (see *Compensation*.) 140.
 where defendant incapable of literally performing, 293.
 where contract otherwise illegal, 294.
 or impossible, 295.
 in railway contracts, 295.
- DAMAGES, why inadequate remedy, 5, 8.
 where adequate, 11.
 where not an accurate satisfaction, 15.
 actions for, restrained, 335, 338, 339.
 compensation, how differing from, 345.

DAMAGES, continued.

when ascertained in equity, 345, 395.
liquidated. (*See Penalty.*)

DEATH of party, contract enforced notwithstanding, 3.
secus when personal qualities required, 49.

of vendor, 47.

of purchaser, 48.

of proposed lessee, 49.

of cestui que vie, 263, 267.

DEBT, contract to purchase enforced, 4.**DEEDS**, stipulation for execution of, 241.
loss of, a bar to vendor's suit, 281.**DEFAULT OF PLAINTIFF.** (*See Performance of his part by Plaintiff.*)**DEFECT IN SUBJECT-MATTER**, patent, misrepresentation as to, 200.

no compensation for, 353.

a defence, 248.

not when patent, 248.

what are latent defects, 249.

unknown to both parties, 250.

variation not a defect, 250.

where description is vague, 250.

in sale with all faults, 251.

may be a ground for compensation, 251.

or for rescission, 252.

arising after contract, (*see Consideration, Failure of,*) 262

DELAY. (*See Time, Lapse of.*)**DEMURRER.** (*See Pleading.*)**DEPOSIT**, action for, restrained, 335.

interest on, 384, 394.

power of the court over, 394.

 where vendor is plaintiff, 394.

 where purchaser is plaintiff, 395.

DETERIORATION, compensation for, 355.

borne by vendor, 386.

 purchaser, 386.

DETINUE, execution in, specific, 14.**DEVISEE** of vendor when a party, 47.

 of purchaser when a party, 48.

DRUNKARD. (*See Intoxication.*)**ELECTION** to proceed at law or in equity, 25.**EVIDENCE**, extrinsic, to prove identity of actual thing and thing described, 92
of one writing referred to in another, 166.

parol, to prove unfairness in contract, 106, 213.

 let in by part performance, (*see Part Performance,*) 188.

 to prove mistake in contract, 213.

 whether admissible for plaintiff, 227.

of parol variation, what, 220.

to rectify contract must be clear, 223.

of simple rescission, 304.

of novation, 303.

of agreement to rescind, 304.

 parol in equity, 305.

 by conduct, 306.

 evidence must be clear, 306.

and title, distinction between, 375.

EXECUTOR of vendor enforcing contract, 47.

of purchaser when a party, 48.

of proposed lessee, 49.

not liable on contracts involving personal qualities, 49.

EXPECTANCIES, agreement as to, 3.

EXPECTANCIES, *continued.*

- sale of, not illegal, 56.
- at law void, 397.
- secus* in equity, 397.
- is only enforceable against contractor personally, 400.

FAULTS. (See *Sale with all Faults.*)

FELONY of plaintiff a bar to suit, 281.

FEME COVERT. (See *Baron and Feme.*)

- when capable of contracting, 72, *n.*

FIRE. (See *Deeds, Consideration, Failure of.*)

FORFEITURE, treated as a penalty, 30.

- liability to, a hardship, 121.

FRAUD. (See *Misrepresentation.*)

- ground of relief in cases of representation as to things past, 84.

- ground for rescission, 106, 308, 309.

- inadequacy of consideration may amount to, 128, 129.

- being privy to fraud on a power a bar to relief, 140, 142.

- takes agreement out of Statute of Frauds, 171.

- in refusing to execute a defeazance, 172.

- in marrying in fraud of an agreement for a settlement, 172.

- in case of wills, 173.

- in not reducing agreement into writing, 173.

- what constitutes, 177.

- modes in which fraud may be set up, 206.

- suppression of a fact, 206.

- by purchaser, 207.

- employment of a puffer when a fraud, (see *Puffer,*) 208.

- by corporations, 210.

- of agent, 210.

- waiver of, 210.

- promise made at execution of instrument and not kept, fraud, 232.

- not protected by conditions of sale, 343.

- no compensation where there is, 352.

- in sales of ships not reciting certificate, 408, *n.*

GOODWILL, contract for sale of, when enforced, 17.

- defined, 17.

HARDSHIP. (See *Contract, Hardship of;* *Time, Lapse of.*)

HEIR of vendor when a party, 47.

- purchaser when a party, 48.

- bound by admission in ancestor's answer, 171.

- of vendor not bound by admission of purchaser, 171.

HIRING AND SERVICE, contracts for, not enforced, 22, 245.

- contracts for, for life, 22, *n.*

- contract for considered hard, 124.

HONORARY ENGAGEMENTS, not contracts, 84, 86.

- where part of an arrangement is contract, part honorary, 246.

HUSBAND AND WIFE. (See *Baron and Feme.*)IDENTITY. (See *Evidence.*)IGNORANCE. (See *Mistake.*)ILLEGALITY. (See *Assignment, Contract, Illegality of.*)

IMPOSSIBILITY OF PERFORMANCE by plaintiff, when an excuse, 275.

- by defendant, a defence, 290.

- when to be judged of, 291.

- contract modelled to avoid, 295.

- of one alternative, 296.

- originally, 296.

- by subsequent act of God, 297.

- other party, 300.

IMPOSSIBILITY OF PERFORMANCE, *continued.*

by subsequent act of stranger, 300.

INCAPACITY. (See *Impossibility, Lunatics.*)

of court to enforce contract a bar to suit, 16.

to perform part of the contract a defence as to rest, 237.

of plaintiff to perform his part when an excuse for non-performance, 275.

of defendant to perform his part a defence, 290.

to contract of parties, a bar, 71.

in case of agreements for separation, 410.

INCOMPLETENESS. (See *Contract, Completeness of.*)

INDEMNITY by purchaser to vendor against covenants, 122.

by way of compensation, 351.

INEQUALITY. (See *Contract, Equality of.*)

INFANT, heir, 48.

incapacity of suing or being sued in specific performance, 133.

infancy no excuse for non-performance by plaintiff, 274.

INJUNCTION, not where increased rent is reserved, 29.

distinction between penalty and damages not discussed on motion to dissolve, 31.

against acting at a theatre, 245, 246, 330.

may be granted where court cannot enforce positive part of contract, 245.

where no distinct negative stipulation, 246.

connection with specific performance, 329.

a mode of specific performance, 329.

where contract a negative one, 329.

against carrying on trades, 330.

where acts complained of are recurring, 331.

to restrain applications to parliament, 331.

husband molesting wife, 410.

mandatory, 332.

ancillary to specific performance, 334.

to preserve property *in statu quo*, 334.

against actions, 335.

matrimonial suits, 335.

restraining third parties, 335.

against action for damages, 335, 338, 339.

INSOLVENT, contract by, when good, 110.

cannot sue as plaintiff for performance, 280.

INTENTION, representations of, 84, 86, 88.

to sign, 161.

INTEREST, where vendor is in receipt of rents, purchase-money being unpaid, 377.

where interest much more than rents, 378.

where delay due to vendor, 378.

where title made out in chambers, 378.

where delay due to purchaser, 379.

where contract reserves rents to vendor, 379.

purchaser discharged from interest by appropriation of money and notice, 379.

when purchaser makes profit on appropriated money, 380.

unappropriated money, 385.

condition for payment of, on delay "from any cause whatever," 380.

construed as dependent on one for delivery of abstract, 384.

amount on which payable, 384.

rate of, 384.

where vendor is in actual possession, 387.

where purchaser is in possession, 387.

condition restricting his payment of, 388.

on reversions, 389.

INTOXICATION of party to the contract, 112, 215.

set up as defence by third party, 112.

ISSUE, quasi parties to marriage contracts, 42.

JUDGMENT CREDITORS, where parties to suit, 32.

LACHIES. (See *Time, Lapse of.*)

LEASE, agreement for, enforced against executors of lessee, 49.
by assignee, 51.

how far a personal contract, 53, 55.

by person out of possession, 57.

where commencement of term not stated, 98.

where length of term not stated, 98.

where lives not named, 98.

suit for sale of, heard after determination of the term, 267.

acts in breach of covenants a bar to suit for lease, 283.

ante-dated to allow of action of covenant, 284.

of copyholds, for longer than custom allows, 294.

underlease not enforced on purchaser of, 349.

when lessor's title not investigated, 360.

waiver of right to investigate, 366.

LETTERS, to prove a contract, 165.

referred to for signature, 165.

must refer to the other paper, 166.

and not to terms in parol, 166.

supplying a term wanting in the agreement, 167.

constituting the agreement, 168.

letter addressed to third person, 168.

letters repudiating contract, 168.

contract constituted by, how to be pleaded, 170.

LIEN of purchaser, bill for, in the alternative, 396.

LOTS. (See *Contract divisible or not.*)

LUNATICS, incapable of contracting, 73.

except during lucid intervals, 73.

effect of lunacy subsequent to contract, 73, 97.

mental incapacity, less than lunacy, 110.

MAINTENANCE. (See *Champerty.*)

MANOR, contract for sale of, 109.

MARRIAGE may be evidence of acceptance of proposals in marriage treaty, 87.

representations made as marriage treaties, 87.

in fraud of agreement for settlement, 172.

not part performance, 173, 184.

but acts connected with may be, 184.

MARRIAGE ARTICLES may be performed at suit of issue, 42.

collaterals, 43, 44.

appointees, 44.

must be performed entirely if at all, 242.

may be enforced notwithstanding default of performance on other part, 277.

not where articles are mutually dependent, 278.

nor by defaulting party, 278.

nor by collaterals of that party, 279.

MAXIMS, "aequitas agit in personam," 25.

"de minimis non curat lex," 36.

"ex dolo malo non oritur actio," 144.

"id certum est quod certum reddi potest," 92, 93.

"ignorantia legis non excusat," 224.

"non videntur qui errant consentire," 212.

"omnia presumuntur rite esse acta," 259.

MEDICINE, secret contract as to, not enforced, 16.

MINES, agreement to work, 20, 105.

misrepresentations as to, 196, 199.

time of the essence in contracts as to, 315, 316.

MINES, *continued.*

right to, a subject of compensation, 352.

MISREPRESENTATION. (See *Fraud, Representation.*)

a ground of defence, 191.

for setting aside contract, 191.

elements of, 191.

mode in which misrepresentation may be set up, 192.

statement must be actually untrue, 192.

the not knowing it to be true, 192.

the person making it need not have known it to be false, 192, 193.

where the agent has no knowledge, but the principal has, 193.

allowing a person to continue in error, 194.

it must have been made in relation to the contract, 194.

generally at the time of the treaty, 194.

corrupt motive not necessary, 195.

the reliance on it by the other party, 195.

vagueness of the representations, 196.

whether of that which can be accurately known or not, 196, 198.

grounds for considering there was no reliance, 197.

resort to other means of knowledge, 198.

other knowledge itself, 200.

when defect is patent, 200.

analogy with warranties, 200.

evidence of knowledge must be clear, 201.

other means of knowledge being open will not displace a misrepresentation, 201.

nor a general statement inconsistent with the misrepresentation, 201.

nor recommendation to consult advisers, 202.

in case of sale with all faults, 202.

in case of assignment of the contract, 203.

misrepresentation must be essential, 203.

avoids contract not *quoad hoc* but *in toto*, 204.

to vendor by purchaser of chances of sale, 208.

value of estate, 208.

conditions of sale inapplicable, where, 343.

no compensation, where, 352.

MISTAKE. (See *Variation, Parol.*)

in compromises, 107.

common, as to subject-matter, 109.

kinds of, in contracts, 212.

defence founded on, 212.

provable by parol evidence, 213.

of defendant, 214.

purely of defendant, 214.

of both parties a ground for rescission, 221.

for rectification, 222.

evidence must be clear, 223.

on what kinds of mistake the court interferes, 224.

mistake of law, 224.

speculation as to facts, 225.

mistake not about the essence of the agreement, 225.

writing purposely differs from agreement, 225.

specific performance with correction of, 227.

MORTGAGÉE, not a party to suit, 32.

of agreement may sue on it, 52.

MORTGAGOR, not party to suit for sale under power, 32.

contract by, enforced against mortgagee buying with notice, 58.

MULTIFARIOUSNESS, bill against several purchasers bad for, 39.

MULTIPARTY of suits, avoiding, 37.

MUTUALITY in contracts of sale, 10.

want of, where one party cannot contract, 71.

DECEMBER, 1858.—19

MUTUALITY, *continued.*

- required, 133.
- in case of tenant in tail, 133.
 - subject to a leasing power, 134.
 - infant, 133.
 - vendor having no estate, 133.
 - husband and wife selling, 134, *n.*
- time when judged of, 135.
- exceptions to, 135.
 - in unilateral contracts, 135.
 - where waived, 136.
 - agreement signed by one party only, 136.
 - agreement contained in a deed poll, 137.
 - vendor has only partial interest, 137.
 - Lord Redesdale's views, 139.

NE EXEAT, when granted in specific performance suits, 337.

NOTICE, purchaser with, liable to contracts, 57.

- covenants, 59.

- rebuts implied terms, 100, 101.

- doctrine of, does not apply where misrepresentation, 201, 202.
- limiting time for performing contract, (*see Time, Lapse of,*) 317.
- of refusal to complete, effect of, on time, 322.

NOVATION, parties to, may be parties to suit, 35.

- rescinds original contract, 301.

- by intervention of new party, 302.

- by introduction of a new term, 302.

- must be a binding contract in itself, 303.

- how evidenced, 303.

OFFER. (*See Proposal and Acceptance.*)

OFFICE, agreement to grant, 134.

OPTION to purchase, 317, 321.

OWNERSHIP, acts of. (*See Payment into Court, Waiver.*)

PARLIAMENT, when application to, necessary, 292.

- agreement to apply to, how enforced, 295.

- injunction against applying to, 331.

- time granted for application to, 371.

PAROL. (*See Evidence, Part Performance, Variation.*)

PARTIAL EXECUTION OF CONTRACT. (*See Incapacity.*)

PARTIES. (*See Agent, Assignment, Incompleteness of Contract, Mortgagee, Mortgagor.*)

- parties to contract parties to suit, 32.

- conveyance, 32.

- judgment creditors, 32, and *n.*

- having adverse rights, 33, 38.

- having no interest, 33.

- sub-purchaser, 33.

- parties to a new contract, 35.

- reversioner, 35.

- remainderman, 36.

- assignees in bankruptcy, 37.

- some suing or being sued on behalf of all, 37.

- purchaser of adjoining lot, 38.

- trustees, 39.

- cestuis que trust, 39.

- issue in cases of marriage contracts, 42.

- collaterals in like cases, 43.

- appointees, 44.

- death of party, 77.

PARTIES, *continued.*

- death of vendor, 47.
 - purchaser, 48.
 - proposed lessee, 49.
 - contractor where personal qualities are required, 49.
- heir of vendor, 47.
 - when an infant, 48.
 - of purchaser, 48.
- devisee of vendor, 47.
 - purchaser, 48.
- widow of vendor, 48.
- executor of vendor, 47.
 - purchaser, 48.
 - proposed lessee, 49.
- assignee of agreement, (see *Assignment*), 51.
- assignor of agreement, 51.
- assignee of the property, 57.
- agents, (see *Agents*), 67.

PARTITION, agreements for, possession may be part performance of, 131.
PARTNERSHIP, agreement for, when enforced, 407.

- when not enforced, 18, 407.

- when silent as to capital, 99.

- when illegal, 407.

- articles varied by course of dealing, 303.

- enforced by injunction, 330.

PART PERFORMANCE, a ground of jurisdiction, 21.

- what acts are not, 22.

- renders court unwilling to entertain objections to the contract, 90, 144.
- met by plea and answer, 157.

- marriage is not, 173.

- takes agreement out of Statute of Frauds, 173.

- essentials of, 174.

- acts must refer to an agreement, 174.

- cannot show the terms, 174.

- acts must not be referable to any other title, 176.

- must render non-performance a fraud, 176.

- when not so from character of person, 177.

- by tenant for life as against remainderman, 177.

- by persons not parties to contract, 177.

- where not so from nature of the act, 178.

- payment of purchase-money not binding on purchaser, 178.

- where there are alternative remedies, 178.

- agreement must be such as can be enforced, 178.

- not of an honorary character, 179.

- nor incomplete, 179.

- possession, not always part performance, 176.

- where part performance, 180.

- adverse, not part performance, 179.

- laying out money, when part performance, 181, 183.

- payment of purchase-money not part performance, 182.

- other money, 183.

- auction duty, 183.

- additional rent, 184.

- marriage alone, not, 173, 184.

- acts connected with it may be, 184.

- execution of marriage settlement, 185.

- cohabitation, 185.

- acts previous to contract, 185.

- preparatory acts, 186.

- giving instructions for deeds, 186.

- obtaining a release from third party, 186.

PART PERFORMANCE, *continued.*

- preparatory appropriation of money, 186.
- performance by another party to the agreement, 187
- evidence parol, let in by the part performance, 188.
- must be clear, 188.
- some indulgence when possession has been taken, 188.
- what variations immaterial, 189.
- parol not excluded by part being reduced to writing, 189.
- admission in answer, sufficient evidence, 189.
- though the statute be pleaded, 189.
- where contract denied by answer, 189.
- where different agreement is set up by answer, 190.
- inquiry as to terms of contract, 190.
- renders contract not under seal binding on corporation, 177.
- of a novation, 304.

PATENTS, time where of essence in contracts as to, 316.

PAYMENT. (See *Part Performance.*)

PAYMENT INTO COURT, where vendor has made out title, 390.

not, 390.

- where agreement allows possession, 391.
- when purchaser is in possession under another title, 391.
- where purchaser acts as owner, 391.
- procedure on order for, 392.

PENALTY, effect on specific performance, 26.

- distinction between penalty and liquidated damages, 26, 31.
- cognizable at law, 26.

performance not limited to amount of, 27.

PERFORMANCE. (See *Conditions, Part Performance.*)

PERFORMANCE OF HIS PART BY PLAINTIFF, how must be proved at law, 2, 273.

must be shown in suit, 270.

extends to representations, 270.

- but not to non-essential terms of the contract, 272, 405.
- nor to collateral contracts, 273.

excused where a tender would have been refused, 274.

- where non-performance is due to default of defendant, 274.
- but not by infancy, 274.

by impossibility, where, (see *Impossibility,*) 275.

exception in marriage articles, 277.

limitations of the exception, 278.

in respect of acts to be done, 279.

PLAN, contract void from doubt as to, 103.

how far a binding representation, 271.

PLEA. (See *Pleading.*)PLEADING. (See *Claim, Parties, Variation, Parol.*)

bill on contract by agent must allege agency, 163.

how it must allege contract within the statute, 169.

how it may allege letters as constituting the contract, 170.

or as evidence of it, 170.

alleging parol variation and offering defendant his election, 220, 233.

for specific performance with parol variation, 227.

must show performance of things on plaintiff's part already to be done, 270.

and readiness and willingness of plaintiff to perform things on his part thereafter to be done, 279.

performance of conditions, 287.

capacity of defendant to perform contract, 290.

praying rescission in alternative, 311.

should pray *ne exeat* where required, 337.

by vendor seeking compensation must raise that question, 344.

by purchaser seeking compensation, 345.

PLEADING, *continued.*

- bill relying on a waiver must allege both facts and legal conclusion, 368.
- alleging acts of ownership, 393.
- in alternative for specific performance or damages, bad, 395.
- by purchaser in alternative for specific performance or enforcing his lien, good, 396.
- demurser relying on Statute of Frauds, 156.
- answer setting up Statute of Frauds, 158.
 - admitting contract alleged, 170, 189.
 - denying contract alleged, 189.
 - alleging a different contract, 190.
 - setting out defect in plaintiff's title, 357.
 - admitting purchaser has only one objection or none, 357.
 - good title, 362.
- plea of Statute of Frauds, 156.
 - and answer relying on Statute of Frauds, 157.
- POSSESSION. (See *Interest, Part Performance, Payment into Court, Rents.*)
- PRESUMPTION, terms implied in contracts by, 99.
- title depending on, 257.
 - on presumption *omnia rite esse acta*, 259.
- PRICE. (See *Consideration, Inadequacy of; Contract, Completeness of.*)
- inadequacy of, evidence of unfairness, 110.
- PRINCIPAL. (See *Agent.*)
- PRINTED NAME. (See *Signature.*)
- PROPOSAL AND ACCEPTANCE, proposal not assignable, 57, 75.
 - contract constituted by, 75.
 - difference between proposal and memorandum of agreement, 75.
 - essentials of acceptance, 76.
 - acceptance must be unequivocal, 76.
 - and without variance from offer, 77.
 - and not introduce a new term, 78.
 - and without unreasonable delay, 79.
 - proposal determined by withdrawal, 80.
 - by refusal, 80.
 - variation of, 81.
 - acceptance may be by parol, 81.
 - by the bill, 82.
 - by acts, 82.
 - time from which acceptance operates, 82.
 - by agreement to do an act on demand, and a demand, 82.
 - by representation and conduct, (see *Representations.*) 83.
- PUFFER, where one is employed and the sale is without reserve, 209.
- in other sales, where one person is employed, 209.
 - where two or more persons are employed, 210.
- PURCHASER FOR VALUE WITHOUT NOTICE, sale to, a defence, 290
- QUARRY, agreement to work, not enforced, 20.
- RAILWAY. (See *Company, Contract, Corporation, Amalgamation.*)
- contract to make, 7, 20, 104.
 - relief on, previous to completion, 243.
- contract as to traffic, 102.
 - to make roads for landowner, 103.
 - for "land required" for, 104.
 - to work, 134.
 - to make and maintain siding, 243.
 - when conditional on making of, 287.
 - enforced ex pres, 295.
- time running under contracts by, 324.
- when interest on purchase-money will not run, 380.
- RECITAL, acted on as agreement, 27, 28.

RECTIFICATION of contract for mistake, 222.

 specific performance with, 227.

 and other relief in same suit, 235.

REFERENCE OF TITLE. (See *Title, Reference of.*)

RELIEF SUBSEQUENT TO DECREE, principle of, 338.

 injunction against resort to other court, 338.

 rescission of contract after decree for performance, 339.

REMAINDERMAN, when he may sue or be sued on contract of life tenant, 36.

 not liable on contracts of tenant in tail, 36.

 not bound by part performance of previous tenant, 177.

RENEWAL. (See *Covenant for Renewal.*)

RENT. (See *Interest.*)

 rent increased, treated as liquidated damages, 29.

 additional payment of, as part performance, 184.

 rents, what, vendor is charged with, 385.

 occupation rent payable by vendor in possession, 387.

 by purchaser in possession, 392.

REPAIRS, covenant to do, enforced, 21.

 stipulation as to, held uncertain, 104.

REPRESENTATION. (See *Misrepresentation.*)

 and acts on faith of, binding, 83.

 of things past, 83.

 of things future, 84.

 must be clear and absolute, 84.

 when not binding, 84.

 when binding, 87.

 in cases of marriage treaties, 87.

 made by plaintiff must be performed, 270.

 plan exhibited, how far a binding, 271.

REPUDIATION. (See *Letters, Rescission of Contract.*)

RESCISSON OF CONTRACT, for fraud, 106, 308, 309.

 for inadequacy of consideration with other circumstances, 128.
 alone, 128.

 for misrepresentation, 191.

 for mistake, 221.

 for defect in subject-matter, 252.

 arising after contract, 262.

 by acts in contravention of contract, 282.

 a defence, 301.

 by consent of parties, 301.

 by novation, (see *Novation,*) 302.

 by simple agreement, 304.

 evidenced by parol, 304.

 even rescinding agreement under seal, 305.

 must be an absolute abandonment, 306.

 evidenced by conduct, 306.

 condition for, when to be exercised, 307.

 when it revives, 309.

 limited by condition for compensation, 310.

 does not apply where fraud, 343.

 bill praying, 311.

 after decree for performance, 339.

RESERVE. (See *Sale without.*)

RETRACTATION. (See *Proposal and Acceptance.*)

REVERSIONARY INTERESTS, sale of, at undervalue, 124, 132.

 onus of proof of fairness, 124.

 time of the essence, in sales of, 315.

 interest on sales of, 389.

REVERSIONER where a party to suit, 35.

 he may enforce covenants when in possession, 35.

 out of possession, 36.

REVOCATION. (See *Agent.*)

ROADS to be made by vendor, representation as to, 270, 271.

SALE, AGREEMENT FOR, implied term as to interest sold, 99.

as to good title, 99.

as to title-deeds, 99.

of all vendor's interest, whatever it is, 142.

"without reserve," 209.

"sale with all faults;" binds, however many may be defects in subject-matter, 251.

not where defects are studiously concealed, 251.

misrepresentation, 203, 251.

SALES BY THE COURT when concluded, 263.

SCOTCH LAW enforces building contracts, 20.

allows a stranger to sue, 41.

SECRET PURCHASE. (See *Trustee.*)

SEPARATION DEED, agreement for, enforced, 24, 410.

injunctions incident to, 410.

consideration in, 411.

SERVICE. (See *Hiring and Service.*)

SETTLEMENT. (See *Voluntary Settlement.*)

SHARES, railway, contract for, enforced, 12, 19, 302.

time essential in such contract, 316.

of estate, not forced on purchaser of whole, 141.

SHIP, contract of sale of, enforceable, 13.

must recite certificate, 408.

where fraud, 408, n.

SIGNATURE by one party only, 81, 136, 161.

what is sufficient, 161, 162.

how far intention is requisite, 161.

in pencil, 163.

in print, 163.

by initials, 163.

when presumed, 169.

SOLICITOR. (See *Attorney.*)

SPECIFIC PERFORMANCE, origin of jurisdiction, 1.

where legal remedy deficient, 1.

by default of plaintiff, 2.

from nature of subject-matter, 3.

from the parties, 3.

from form of contract, 3.

formerly only where damages at law, 4.

where legal remedy inadequate, 5.

none, where adequate, 6.

nor *semble* where alternative remedy, 7.

where legal remedy not so beneficial, 8.

at suit of vendor, 10.

where damages not accurate satisfaction, 15.

none, where contract revocable, 18, 19, 407.

where of building contracts, 19, 20, 21.

nor of contracts of hiring and service, 22.

where no original jurisdiction in court, 24.

of foreign contracts, 24.

of contracts for land abroad, 25.

none of voluntary contracts, 25.

 where plaintiff proceeds at law, 25.

matter rest in treaty, 75.

 conclusion of contract is doubtful, 75.

contract incomplete, 90.

necessitating breach of trust, 113.

party not lawfully competent, 113.

SPECIFIC PERFORMANCE, *continued*.

none where court cannot execute the whole contract, 237, 240.

except where right of suit is perfect, 242.

contract can be completely performed, though there are future acts, 243.

part cannot be performed through defendant's default, 244.

there are negative and positive stipulations, 244.

agreement is partly honorary, 247.

alternative, 246.

part that could not be enforced has been performed, 247.

STATUTE 32 H. VIII. c. 9, 55, 292.

6 Geo. IV. c. 110, 408.

8 & 9 Vict. c. 16, 155.

8 & 9 Vict. c. 89, 408.

Trustee act, 1850, 48, 73.

Lunacy Regulation Act, 1853, 73.

17 & 18 Vict. c. 104, 408.

18 & 19 Vict. c. 91, 408.

STATUTE OF FRAUDS. (See *Agent, Letters, Pleading, Signature.*)

foreign contract within, 24, 155.

does not prevent a party to contract disclosing his principal, 67.

requires only signature by party charged, 81, 136, 161.

nature of interest of other party, 137, *n.*

allows parol evidence of identity, 92.

refers to solemnities not procedure, 155.

how taken advantage of, 156.

by demurrer, 156.

by plea, 156.

by plea and answer, 157.

by answer, 157.

what satisfies the statute, 158.

agreement may be evidenced by any kind of writing, 159.

must leave nothing open, 159.

approval of a draft not enough, 160.

where a formal agreement is intended, 160.

parol agreement before marriage, written after, 169.

agreement, how to be pleaded, 169.

what takes agreement out of, 170.

sale by court, 170.

admission in answer, 170.

as against representatives, 171.

fraud, (see *Fraud,*) 171.

part performance, (see *Part Performance,*) 173.

does not affect position of defendant, 213.

render writing necessary for agreement to rescind, 305.

STEWARD not a party to suit for sale, 32.

STOCK, agreement for sale of, not enforced, 11.

STRANGER to contract not a proper party, 32, 41.

cannot sue, though taking a benefit, 41.

exceptions to rule, 42.

as to marriage contracts, 42.

issue, 42.

collaterals, 43, 44.

appointees, 44.

from relationship of parties, 45.

where third party's status is charged, 45.

rendering one alternative impossible, 300.

interest of, in contract does not prevent its rescission, 301.

SUBJECT-MATTER. (See *Default in; Consideration, Failure of.*)

not vendor's at time of contract, 291, 292.

SUB-PURCHASER when a party, 33.

SUCCESSION. (See *Expectancies*.)

SUPPRESSIO VERI may prevent performance, 111.

SURPRISE. (See *Contract, Fairness in.*)

TENANCY FROM YEAR TO YEAR, agreement for, not enforced, 3.

TENANT FOR LIFE, contract by, prejudicial to remainderman, 117.

not binding on remainderman, 133.

secus where contract under a power, 134.

contract by, inconsistent with, or in excess of, the power, 138, 139, 140, 142.

estate of, sans waste when not claimable by a purchaser of the fee, 141.

part performance of, not binding on remainderman, 177.

TENANT IN TAIL, cannot sue or be sued on contracts of tenant for life, 133.

in remainder, contract for sale by, how enforced against, 138.

TENURE, DIFFERENCE IN. (See *Compensation*.)

THEATRE, contract to perform at, 103.

not to perform at, 245, 246, 330.

TIMBER, ornamental, not a subject of compensation, 353.

TIME, LAPSE OF. (See *Title, Reference of.*)

will be considered as making possession an act of part performance, 181.

a defence, 312.

at law essential, 312.

in equity, 313.

originally of the essence, 313.

express, 313.

implied, 314.

from subject-matter or object of contract, 314.

where for commercial purposes, 315.

in contracts as to mines, 315, 316.

where delay creates hardship, 317.

from other parts of contract, 317.

where contract is unilateral, 317.

engrafted by notice, 317.

time must be reasonable, 318.

what notice required, 319.

as laches, 319.

when contract unilateral, 321.

when contract substantially executed, 322.

pending negotiation, 323.

attributable to defendant, 323.

when deposit is left, 323.

where possession is continued, 324.

under railway acts, 324.

what claim prevents it running, 324.

in covenants to renew, 404.

waiver of objections as to time, 324.

TITHES. (See *Compensation*.)

TITLE to be shown by vendor, 99.

must be free from doubt, 253.

present rule as to doubtful, 253.

amount of doubt that is defence, 255.

moral certainty only required, 256.

depending on presumptions, 257.

nature of the doubt, 261.

bill dismissed at hearing for want of, 357,

TITLE DEEDS. (See *Deeds*.)

TITLE, REFERENCE OF, origin of right, 357.

when vendor plaintiff, 357.

vendor cannot except to his own, 357.

when purchaser plaintiff, 358.

under what contracts, 358.

when not made, 358.

TITLE, REFERENCE OF, *continued.*

- where vendor sells such interest as he has, 358.
- limited inquiry, 359.
 - excluding lessor's title, 360.
- waiver of right right to, (see *Waiver*,) 361.
- when made, 368.
 - at the hearing, 368.
 - before hearing, but after answer, 368.
 - before answer, 369.
- extent of the reference, 370.
- when title may be made out, 371.
- when time not granted, 371.
- old title cured or new title, 372.
- form of certificate, 373.
- exceptions, 373.
- reference back, 373.
- title at hearing on further directions, 373.
- what are questions of title, 369.
 - distinguished from conveyance, 374.
 - evidence, 375.

TRADE, injunction against carrying on, 330, 331.

TRESPASS, bill for performance and to restrain, 33.

TRUST of chattels, 15.

- for performance of illegal contract, 145.
- the result of an illegal contract, 146.

TRUSTEE, when a party, 39.

- secret contract with, when enforceable by beneficiary, 53, 54.
- for married ladies where parties, 72.
- incapacity to contract with cestuis que trust, 74.
- what contracts not enforced against, 113, 114, 122.
- contracts between, and cestui que trust enforced by latter, 136.
- covenants by, 280.
- renewals of leases by, 404.

ULTRA VIRES. (See *Contract Ultra Vires*.)*UNCERTAINTY.* (See *Contract, Certainty of*.)

UNDERLEASE, agreement for, what terms implied, 100.

- not forced on purchaser of lease, 349.

UNDERTAKING. (See *Contract Unilateral, Honorary Engagements*.)UNFAIRNESS. (See *Contract, Fairness in*.)

VARIATION, PAROL, doctrine does not apply where part performance, 189.

- defence to suit, 216.
- where enforced, 216.
- where bill is dismissed, 217.
- where plaintiff put to his election, 218.
- alleged by plaintiff, 220, 227, 233.
 - defendant, 220.
- coming out on evidence, 220.
- what evidence required, 220.
- subsequent to the agreement, 226.
- can it be set up by the plaintiff? 227.

VOID, conditions rendering contracts, 307.

VOLUNTARY CONTRACTS not enforced, 25.

VOLUNTARY SETTLEMENT, sale to override, cannot be enforced by settlor, 113, 258.

- but may be by purchaser from, 136.
- title depending on invalidity of, forced on purchaser, 258.

WAIVER of proviso against assignment, 55.

- of want of mutuality 136, 372.

WAIVER, *continued.*

- of fraud, 210.
- of breach of covenant, 285.
- of conditions precedent, 289.
- of right to rescind, 308, 309.
- of objections as to time, 324.
 - not a waiver of the thing to be done, 326.
- of reference of title, 361.
 - by vendor, 361.
 - by purchaser, 361.
 - express, 362.
 - implied, 362.
 - where objection known and curable, 363.
 - incurable, 363.
 - where an agreement for possession, 364.
 - where objection is not known, 364.
 - from silence of a subsequent agreement, 366.
 - acts not a waiver, 366.
 - waiver of lessor's title, 366.
 - effect of waiver of right to reference, 367.
 - how pleaded, 367.

WARRANTY in contracts for sale of chattels, 262, 263.

WAY, RIGHT OF, sale of land without, 124.

over ground sold for building, 348.

WIDOW of vendor, where a party, 48.

WIFE. (*See Baron and Feme.*)

WITHOUT RESERVE. (*See Sale, Agreement for.*)



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